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Supreme Court of the United States

OCTOBER TERM, 1942

No. 1020

NORTH KANSAS CITY DEVELOPMENT COMPANY, NORTH KANSAS CITY BRIDGE AND RAILROAD COMPANY and NORTH KANSAS CITY LAND AND IMPROVEMENT ASSOCIATION,
Petitioners,

against

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

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Counsel for Petitioners.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, the undersigned, submit this petition and pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit insofar as it affirmed the final judgment of the United States District Court for the Western Division of the Western District of Missouri, insofar as the said judgment of the District Court adjudicated the right of the respondent, the Burlington Railroad, to condemn the property in the said judgment described.

Jurisdiction and Timeliness of the Present Application

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (U. S. C. Title 28, section 374(a)).

The judgment of the Circuit Court of Appeals for the Eighth Circuit was made on March 2, 1943 (R. 2036). The opinion is found at R. 2014.

On March 16, 1943, the Circuit Court made an order (R. 2040) staying the mandate of that court for a period of sixty days from that date, and providing that if within such sixty days there is filed with the Clerk of that Court a certificate of the Clerk of this Court that a petition for writ of certiorari, record and briefs have been filed, the stay granted shall continue until the final disposition of the case in this Court.

The complaint was filed in the District Court on November 12, 1938. Jurisdiction was predicated upon diversity of citizenship—the plaintiff is an Illinois corporation and the defendants corporations or residents of Missouri. The Burlington, plaintiff below, sought to condemn nineteen separate rights of way about seventeen feet in width, totaling about nineteen acres and 10.8 miles of lead tracks and certain switch turnouts located in the north Kansas City Industrial District of North Kansas City, Missouri. These tracks connected with sidings for approximately one hundred industries located in the said district and connected with the main line of the Burlington which ran parallel to the Missouri River. During the years 1923 to 1940, inclusive, there were 673,945 loaded cars transported over the tracks sought to be condemned. For the period from 1935 to August 31, 1941, inclusive; the number of cars operated was 247,011. In 1940 the number of cars operated was 34,499, and for the first eight months of 1941 the number of cars operated was 27,547 (Pl. Ex. 17, R. 468-9; Def. Ex. 66, R. 1272, 1516, 1517). The Burlington operated over the tracks and since 1921 paid to the Bridge Company $1.00 for each car transported. For a period of over thirty-five years each of the petitioners here had but three stockholders who owned the stock in equal shares, one of which stockholders was the Burlington itself. For that whole period the Burlington participated in the affairs of the companies and in

the construction of the very tracks here involved, but for reasons hereinafter set forth seeks to condemn them at this time. *The testimony is uncontradicted that the tracks are being used for railroad purposes and that Burlington intends to devote the tracks and rights of way for the very same purpose as that to which they now are being devoted* (R. 730, 765-6, 282).

Section 5248 R. S. Mo. 1939 provides:*

> "*Corporate powers to cease when* . . . If any corporation formed under this article shall not, within two years after its articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road, and shall not within one year thereafter expend thereon not less than ten per cent. on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of the filing of its articles of association, as aforesaid, its corporate existence and powers shall cease; *Provided*, that if a portion of its road shall be finished and in operation, it shall continue its corporate existence with power to hold and manage the portion of its road so constructed and for no other purpose."

Section 1512 R. S. Mo. 1939 provides:

> "In case the lands sought to be appropriated are held by any corporation, the right to appropriate the same by a railroad, telephone or telegraph company shall be limited to such use as shall not materially interfere with the uses to which by law, the corporation holding the same is authorized to put said lands * * *."

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* References are made to and quotations are made from the Revised Statutes of Missouri of 1939 even though a predecessor statute may have been in effect at a particular time referred to, if the particular statute has not been changed in the various revisions of the Missouri statutes.

Contentions Below

In the courts below the contentions of the parties were as follows: In support of its right to condemn, the Burlington contended (1) that the Development Company, (also a petitioner here) having the same stockholders as the Bridge Company, rather than the Bridge Company owned the tracks and rights of way sought to be condemned, and that the Development Company was a real estate company not authorized to operate a railroad and, therefore, pursuant to Section 1512 *supra* could not resist condemnation; (2) that the charter of the Bridge Company was forfeited in or before May 1911, before the tracks sought to be condemned were constructed,* because of the company's failure to construct the road described in its charter within the period prescribed by Section 5248 *supra,* and, accordingly, the Bridge Company had no authority to own or use the tracks, and that even if it did the charter did not authorize the dedication and ownership of the particular tracks and rights of way sought to be condemned. It contended therefore that under Section 1512 *supra* the defendants could not resist condemnation.

The defendants, on the other hand, contended (a) that the tracks belonged to the Bridge Company; that they were constructed upon the land of the Development Company with its consent and that, therefore, the Bridge Company had a perpetual easement for railroad purposes; (b) that the Bridge Company was in fact a Union Depot Company or a railroad and a union depot company, and that the self-executing forfeiture provisions of Section 5248 of the Missouri statutes did not apply to a Union Depot Company.**

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* It was conceded by the defendants that the tracks were constructed after 1911.

** The provisions of the Missouri statutes as to the formation and powers of Union Depot Companies are set forth in Appendix A of the annexed brief.

(c) that the land and tracks were being devoted to a public use; that under the doctrine of *State ex rel. Public Service Commission* v. *Missouri Southern R.R. Co.*, 279 Mo. 455, such use could not be abandoned; that the use for which they were sought to be condemned was the *same use* as that to which they were being devoted and that they could not be condemned for that same use by the Burlington; (c) irrespectice of all the foregoing, the defendant contended that the Burlington could not urge the forfeiture of the charter of the Bridge Company or that its operations or those of the Development Company, (if it owned the tracks) were ultra vires for the following reasons: For more than thirty years prior to the institution of the action, the Bridge Company and the Development Company were "close corporations" and each had but three stockholders, of which the Burlington was one, each stockholder owning one-third of the outstanding capital stock of the company; that during the same period Burlington actively participated in the direction and affairs of the companies, including the construction and operation by the Bridge Company of the *very tracks sought to be condemned;* that during this period of thirty years a great deal of money had been expended in the building of the tracks in question and in erecting a bridge over the Missouri River to connect with the same, which moneys in a large part were advanced by the holders of the other two-thirds of the stock in the aforesaid companies and by the Burlington itself; that the Burlington had continuously operated the cars over the tracks since 1921 and paid the Bridge Company $1.00 for each car transported thereover without any question as to the ownership of the tracks by the Bridge Company or as to its corporate existence, and it earned large profits from such operation; that through the years the Burlington had reported to the Interstate Commerce Commission that it was operating the railroad of the *Bridge* Company, and that it had done and acquiesced in the doing of innumerable other acts established upon the trial recognizing the Bridge Company as an existing entity.

In view of these facts and others not necessary to state at this time, it was contended that under the doctrine of quasi estoppel existing in Missouri (*Lawson* v. *Cunningham*, 275 Mo. 128), the Burlington was barred by its acquiescence, waiver and acceptance of benefits from claiming that the Bridge Company's charter had been forfeited, and that the ownership and operation of the tracks and rights of way were unauthorized by the charter. The defendants further contended that the recognized principle that there could be no waiver by contract of the right of condemnation was inapplicable; that that principle was predicated upon the public policy that land which was needed for a public use could not be withdrawn therefrom by private contract or otherwise, but that that principle was inapplicable here because here the property was already dedicated to the same public purpose. The defendants accordingly contended *not* that the plaintiff could not urge the right of condemnation but that the plaintiff could not urge condemnation because of the forfeiture of the defendant's charter or ultra vires, and that, therefore, the court must determine the right to condemn as if the Bridge Company was a *de jure* corporation operating *intra vires*, and upon that assumption it must simply determine whether the property was already dedicated to and used for the same public use as that to which the plaintiff concededly sought to put the property.

Finally, the defendants contended that the reason for the institution of this condemnation suit was that the defendants desired to build a crossing over the tracks of the Burlington so as to connect the tracks here sought to be condemned with the tracks of the Bridge Company which operated on the bridge over the Missouri River and connected with the defendants' tracks in Kansas City; that the Public Service Commission of Misosuri had granted an application of the Bridge Company to determine the method of the crossing, and that the Burlington feared that its monopoly in the transportation of traffic out and into the North Kansas City district would be ended and that the

shippers in that district would have the choice of carriers which would bring in and take out of the district the large amount of traffic involved.

Holding of the Circuit Court of Appeals

The Circuit Court of Appeals held in effect as follows: (a) That it was unnecessary to determine whether title to the land and tracks was in the Development Company or in the Bridge Company because *neither* could resist condemnation, and therefore the Court did not consider the evidence on this question. As to the Development Company it held that it was a real estate company unauthorized to own or operate a railroad company. It held further that if the Bridge Company were a railroad corporation, its charter was forfeited by virtue of Section 5248 *supra* in so far as any right to own the property sought to be condemned* that even if the defendant Bridge Company was a Union Depot Company or a Union Depot Company and a Railroad Company, the self-executing forfeiture provision above quoted was equally applicable; (b) that even if the charter were not forfeited, the construction of the particular tracks here sought to be condemned was ultra vires and that, for all these reasons, under Section 1512, *supra,* the plaintiff had the right to condemn; (c) as to waiver and acquiescence or quasi estoppel, the Court *did not consider the sufficiency of the evidence to sustain this defense,* but ignoring the underlying reason for the rule held that the contention of the

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* The court, however, specifically, held that it had no occasion to consider the question of the Bridge Company's corporate existence in relation to the bridge over the Missouri River which the Bridge Company sold to the City of Kansas City (Defendant's Exhibit 3), or in relation to any property other than that sought to be condemned and, therefore, the court did not determine that the Bridge Company's corporate existence was wholly forfeited, and the Burlington's right to condemn was affirmed "to the extent stated in the opinion" (R. 2020).

defendants that there could be a waiver of forfeiture or ultra vires was merely an attempt to argue that the exercise of the power to condemn might be subject to private estoppel and that the *only* limitations on the right to condemn were those contained in the aforesaid Section 1512. Accordingly, the Circuit Court of Appeals held that the plaintiff had the right to condemn the rights of way and tracks described in the complaint.

Proceedings in the District Court

In the District Court a separate trial without jury was had as to the plaintiff's right to condemn and an interlocutory judgment (R. 139) was entered adjudicating the existence of such right. Thereafter a trial as to the amount of damages was had before Commissioners and exceptions were filed to the Commissioners' report (R. 139). Thereupon, as provided by Missouri statutes, a jury trial was had on the issue of damages and a verdict rendered against the plaintiff in the amount of $835,000 (R. 151). Upon that verdict a final judgment was entered (R. 151) which adjudicated both the plaintiff's right to condemn and the obligation of the plaintiff to pay the said sum of $835,000. From this final judgment the defendants, petitioners here, appealed (R. 183) to the Circuit Court of Appeals for the Eighth Circuit and there raised the question as to the plaintiff's right to condemn, and the plaintiff in turn appealed (R. 179) from the final judgment insofar as it awarded said sum of $835,000., alleging errors in the admission of evidence and in the Court's charge to the jury. The Circuit Court of Appeals (R. 2036-7) upon the defendants' appeal affirmed the judgment insofar as it adjudicated the right to condemn, and upon the plaintiff's appeal reversed the judgment and ordered a new trial on the issue of damages. From the judgment of the Circuit Court of Appeals affirming the final judgment of the District Court adjudicating the right to condemn, the defendants prosecute this application.

Statement of Salient Facts

Before setting forth the specific questions presented for review and the reasons relied on for the granting of a writ of certiorari, it is essential that there be set forth a brief history of the North Kansas City enterprises and the participation of the Burlington in the affairs of the petitioners for a period of over twenty-five years. The Bridge Company was incorporated in 1901 (R. 269) under the name of the Union Depot Bridge and Terminal Railroad Company, which subsequently, in 1926, was changed to its present name (R. 275). Its charter (R. 270) recited that it was formed under Chapter 12, Article 2 of the Revised Statutes of Missouri (the statutes in effect being the revision of 1899), and that it was organized for the purpose of constructing and operating a standard gauge railroad and constructing, operating and maintaining a union depot. The charter specifically described the places to and from which the railroad was to be constructed.* The charter *further provided* that the Bridge Company was organized for the purpose of (R. 270, 273):

> " . . . construction, establishing, maintaining and operating a union station in or in the neighborhood of any city of this state, for passengers or freight depots or both, and relating to the building, maintaining and operating terminal railroads and terminal facilities to be used in connection with such union station or depot . . .
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> " . . . The further object and purposes of the corporation and for which it is formed are to construct, establish, maintain and operate in Kansas City, Missouri, a union station for passenger or freight depots, or both, with the necessary offices and rooms convenient therefor, and the appurtenances thereto . . . and to build, maintain and operate terminal railroads and terminal facilities to be used in con-

* The road specifically described was never constructed (R. 290-292, 747-751, 681-7).

nection with such union depot or station and to build, maintain and operate a railroad and railroad bridge over the Missouri River at Kansas City, Jackson County, Missouri, and to construct tunnels as and for approaches to said union station or depot; and to construct, maintain and operate in connection with said railroad bridge a toll-bridge for the passage of wagons, vehicles, foot-passengers and animals, and to charge reasonable rates of toll therefor, and to do and perform every act and thing necessary, requisite or proper to be done in and about and in connection with the objects and purposes aforesaid, and to avail itself of and to have, exercise and enjoy all the rights, powers and privileges conferred by the laws and statutes of the State of Missouri in such cases made and provided."

The Development Company acquired lands in the North Kansas City area.* The property at that time was owned in equal parts by what are described in the Record as the Swift and Armour interests (R. 744-747). In 1903 one-third of the stock of both companies was acquired by the Burlington so that the companies then had three stockholders, the Swift interests, the Armour interests and the Burlington, each owning one-third of the stock, described by witnesses as a "syndicate" or "partners" (R. 436, 451, 746). From that time on until the institution of the present suit, a period of thirty-five years, the Burlington continued to own one-third of the stock of the companies (R. 436, 1024), directly appointed one-third of the Board of Directors and the Executive Committees of the companies, and similarly the other two stockholders each appointed one-third of the directors and the Executive Committee (R. 758,

* In three instances the tracks were constructed on land standing in the name of the North Kansas City Land and Improvement Association and in the name of Hugh Curran and F. F. Fratt (R. 122, 123). These three are also parties-defendant to this suit (R. 34, 35, 135). Inasmuch as they are in the same position as the Development Company, no separate references will hereafter be made to them.

771). Between 1903 and 1909 attempts were made to interest other railroads in Kansas City in the building of a new Union Station (R. 285,751), but these efforts were unsuccessful because a different location was decided upon (R. 285, 751). In 1909 the Bridge Company began the construction of a bridge over the Missouri River (R. 292, 751-2, 1025), the piers for which were laid as early as 1902 (R. 760). The bridge was finished in 1911 as a double deck bridge (R. 292, 1025). The cost of the bridge was $1,870,000. (R. 760) and was paid for in the following manner: Each of the stockholders loaned the Development Company like sums of money and received notes therefor (R. 752, 420, 932-933, 760). The Development Company in turn paid the bills for the construction of the bridge, issuing checks therefor on the direction of the Bridge Company (R. 293, 759). The amounts thus advanced were charged on the Development Company's books to the Bridge Company and appropriate entries showing the obligations were made on the Bridge Company's books. The latter company gave notes to the Development Company for the money thus advanced (R. 752, 420, 932, 426, 434, 449). The construction of the tracks here sought to be condemned began in 1912 and continued through 1937 (R. 287-289). Payment for the construction was made by the Development Company and here again the costs were charged on the Development Company's books to the Bridge Company and the Bridge Company entered its obligation to the Development Company upon its own books (R. 420, 423, 434, 435). Beginning in 1912 with the construction of the lead and switch tracks, the Burlington operated cars thereon and furnished service to and from the industries in the area (R. 293, 294, 463, 464, 712). While it operated the cars under its own motive power and with its own crew, the Bridge Company maintained the tracks (R. 448, 450, 450, 465, 1267). At first the Burlington did not pay anything for the privilege of operating its cars over the tracks which were maintained at the expense of the Bridge Company (R. 625, 626, 799, 913-8,

1267).* In 1921 a contract was made under which the Burlington was to pay $1.00 for each car transported (R. 1006-10), but the tracks continued to be maintained by and at the expense of the Bridge Company (R. 448). Payments were made by the Burlington to the Bridge Company each month (R. 421, 422, 590-612). In 1927 the Bridge Company sold the bridge to the City of Kansas City and Clay County for $1,500,000., and under the deed and agreement (R. 800, Defendant's Exhibit 3)** to which the State Highway Commission was a party. The Bridge Company reserved an easement to use the lower deck of the bridge for railroad purposes and also certain other rights. The court left open the question whether the rights in the bridge were forfeited (See footnote p. 7). The Bridge Company also undertook certain important perpetual obligations executory in nature. It agreed, among other things, to operate, raise and lower the lift span to enable boats to pass through. The purchase price was paid over by the Bridge Company to the Development Company which credited the amount on the Bridge Company's notes and then used the moneys to pay the Development Company's notes which were held by the three stockholders, including the Burlington (R. 420, 760-1, 915-6).

Throughout the years the Burlington has regularly filed reports with the Interstate Commerce Commission listing the Bridge Company as the owner of the tracks and rights of way (R. 507-8, 516-558). The Bridge Company made reports to the State Tax Commission of Missouri and the State Board of Equalization as owner of the tracks and the latter assessed it as the owner thereof (R. 428, 429, 762, 935,

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* The question as to whether this contract was with the Bridge Company or the Development Company was litigated in the District Court and the Court found that the contract was with the Development Company. The Circuit Court, in view of its conclusions on the law, did not find it necessary to determine whether there was evidence to support this finding of the District Court (F. R. C. P. 81(a) Subdiv. 7 and Rule 52*a*).

** Original submitted with the Record.

937). It paid taxes thereon as railroad property (R. 762, 913). It appeared before the Public Service Commission as the owner of the tracks (R. 704). It was recognized as a corporate entity in a Deed and Agreement with the City of Kansas City, Clay County, Missouri and the State Highway Commission of Missouri under which the State Highway Commission assumed obligations to the Bridge Company. (Section 2, Defendants' Exhibit 3; R. 800). *At no time was its corporate existence or charter powers questioned. At all times the State and its agencies acquiesced in its ownership of the tracks.*

In the absence of a connection between the bridge over the Missouri River and the tracks which are here sought to be condemned, and which are north of the Burlington railroad, the Burlington had a most profitable monopoly on moving traffic in and out of the district (R. 1375) with revenues averaging hundreds of thousands of dollars (R. 1276-9, 1320-22).* The Bridge Company recognized that it would receive a more adequate return and that its lines could be operated more efficiently if its tracks north of the Burlington crossed the Burlington and connected with the bridge than with the tracks owned by the Bridge Company in Kansas City (R. 1327). Such a crossing would permit the Bridge Company to enter into operating agreements with a number of railroads, such as the Missouri Pacific and the Wabash, for the operating of cars into the North Kansas City district, and would give shippers a selection of carriers (R. 1313). Such a crossing had been planned ever since the first lead and switch tracks had been constructed and a right of way for that purpose had been reserved (R. 424, 452, 454-8, 1327).

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* During the years 1923 to 1940, inclusive, there were 673,945 loaded cars transported over the tracks sought to be condemned. For the period from 1935 to August 31, 1941, inclusive; the number of cars operated was 247,011. In 1940 the number of cars operated was 34,499, and for the first eight months of 1941 the number of cars operated was 27,547 (Pl. Ex. 17, R. 468-9; Def. Ex. 66, R. 1272, 1516, 1517).

In 1929 the Swifts and the Armours disposed of their stock and other interests to Terminal Shares, Inc., a wholly owned subsidiary of Alleghany Corporation (R. 436, 674-675) which was then the holder of a majority of the stock of the Missouri Pacific Railroad (R. 1032, 679). Terminal Shares, Inc. then pledged its stock to secure its notes and its notes (secured by said stock) in turn are pledged for bonds issued to the public by the Alleghany Corporation under three indentures (R. 1035, 271). The bonds and stock of Alleghany Corporation are widely held by the public and are dealt in on the New York Stock Exchange.

In *1931* the Bridge Company filed an application with the Missouri Public Service Commission asking it to fix the place and manner of crossing as provided by Missouri statutes (R. 668, 805). This proceeding was dismissed without prejudice pursuant to a stipulation of the parties that efforts to arrive at a settlement were being made (R. 829). Negotiations failed and the Bridge Company on May 7, 1937 (R. 839) filed a *second application.* The Burlington filed an answer (R. 846) wherein it admitted the corporate existence of the Bridge Company and its ownership of the tracks. Subsequently, however, the Burlington claimed to have "discovered" (R. 960, 999) for the first time that the Bridge Company's charter had expired many years before and that everything which had been done with the knowledge, approval and active cooperation of the Burlington was in fact done by a non-existent corporation. Burlington thereupon amended its answer in the proceeding before the Commission and alleged the forfeiture of the Bridge Company's charter because of its failure to construct the road. The Public Service Commission nevertheless granted the application in a comprehensive opinion (R. 875).* There-

* This opinion sets forth the history of the petitioners and while it leaves to the courts the question of forfeiture, estoppel, etc., it finds that the Bridge Company was an "existing organized entity exercising the function of a railroad company" and was under the jurisdiction of the Commission (R. 890, 891).

upon, instead of attempting to review the order of the Publice Service Commission upon which review the status of the Bridge Company could be determined in the State courts, the Burlington instituted a condemnation suit in the United States District Court for the condemnation of the lead tracks and rights of way. This suit was dismissed without prejudice because of the failure of the Burlington to attempt to agree with the defendants upon the price to be paid for the property as required by the Missouri statutes (R. 1291). Following this adjudication the present suit was instituted. Since the institution of the suit, application has been made by the Bridge Company to the Interstate Commerce Commission (Exhibit 23) (R. 1298), for a certificate of convenience and necessity for the construction of the tracks over the tracks of the Burlington. The application has been adjourned pending the outcome of this litigation.

No attempt will be made here to set forth the other facts upon which it was urged that the Burlington because of its acquiescence and waiver was barred from questioning the corporate existence of the Bridge Company, or to claim that the construction of the particular tracks was *ultra vires*, because the Circuit Court of Appeals did not *deem it necessary to* pass upon the sufficiency or legal effect of this evidence and held simply that as a matter of law there could be no estoppel.

The testimony is uncontradicted that the tracks are being used for railroad purposes and that the Burlington intends to devote the tracks and rights of way to the very same purpose as that to which they now are being devoted (R. 730, 765-6, 282).

Important Questions Presented

From the foregoing statement, it is apparent, however, that this effort to condemn the tracks and rights of way has its genesis in the fact that the Bridge Company is about to provide the North Kansas City industrial district with addi-

tional railroad facilities by building a crossing over the Burlington tracks and thus end the Burlington's monopoly in handling the freight in and out of the district; and that the Burlington, despite its active participation in the affairs of the defendant over a period of thirty-five years and in the construction of the very tracks sought to be condemned now seeks to maintain that monopoly and deprive the defendants of the benefit of its enterprise and the North Kansas City area of the additional service that would be provided. Whether this result should be permitted is a question of paramount importance to numerous industries in a large metropolis, a consideration which of itself warrants the granting of this petition. (See, *St. Louis, Kansas City and Colorado Railroad Company* v. *Wabash Railroad Company and City of St. Louis,* 217 U. S. 247, 251.)

The first question presented is whether the District Court had jurisdiction of this action. The Missouri condemnation statutes delegate to foreign railroad corporations the power of eminent domain* but provide that petitions for condemnations shall be filed in a particular State court—the Circuit Court of the county in which the land lies (section 1504, R. S. Mo., 1939).**

In *Madisonville Traction Company* v. *St. Bernard Mining Co.,* 196 U. S. 239 (decided in 1904), this Court held

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* *Gray* v. *St. Louis & San Francisco R. R.,* 81 Mo. 126; *So. Ill. etc.* v. *Stone,* 174 Mo. 1, 23.

** Sec. 1504. In case land, or other property is sought to be appropriated by any road, railroad, telephone, telegraph or any electrical corporation * * * and the owners cannot agree upon the proper compensation to be paid, or in case the owner is incapable of contracting, be unknown, or be a non-resident of the state, such corporation may apply to the circuit court of the county of this state where said land or any part thereof lies, * * * and praying the appointment of three disinterested freeholders, as commissioners, or a jury, to assess the damages which such owners may severally sustain in consequence of the establisment, erection and maintenance of such road, railroad, telephone, telegraph line, or electrical line * * *.

that a proceeding for condemnation pursuant to a state statute brought by a resident of the State could be *removed* into the Federal Court by a non-resident defendant landowner upon the ground of diversity of citizenship because the action was one of which the District Court would have originally had jurisdiction, and held in effect that the right and remedy were separable. This Court divided five to four on the question, a dissenting opinion having been written by Mr. Justice Holmes and concurred in by Chief Justice Fuller and Justices Brewer and Peckham. The question is whether this decision should be adhered to at the present time.

The second question is whether the District Court should have refused to entertain this action under the doctrine of *forum non conveniens* or the equivalent doctrine of "appropriate forum," and whether the assumption of jurisdiction was contrary to recent pronouncements of this Court. Jurisdiction is predicated on diversity of citizenship and the case involves solely the construction of Missouri statutes some of which have never been construed by the State courts by decision applicable here, and in addition involves questions of public policy of the State of Missouri which should be left to the State courts where, as here, those courts were equally available.

Specifically, the Circuit Court of Appeals had to pass upon the following intricate questions of state law:

1. The forfeiture statute (Section 5248 R.S. Mo. 1939).

2. The Acts of 1879 and 1899—the determination as to whether these made the self-executing forfeiture provision applicable to union depot companies.

3. The Union Depot Statute (Sections 5251 and 5252 R.S. Mo. 1939).

4. The application of the section limiting the right of condemnation by railroad companies (Section 1512 R.S. Mo. 1939).

5. The availability of the defense of waiver or estoppel, and whether such waiver or estoppel precludes predicating the right of condemnation upon forfeiture of charter or ultra vires alone.

The third question is whether the principle that a corporation to which has been delegated the sovereign power to condemn cannot surrender that power by private agreement and thereby free property from condemnation, has any application here where the property is already devoted to the same public use; and whether that principle precludes the defendants from urging that the acquiescence and waiver of the Burlington and its participation in the affairs of the defendants as stockholder and otherwise bars it from basing its right to condemn on forfeiture or ultra vires; and whether the right to condemn should not be determined as if the Bridge Company was a de jure corporation acting ~~ultra~~ vires—leaving as the only question whether the proposed use in fact is the same as the present use.

The fourth question is whether the court below erroneously construed section 1512 of the Missouri Revised Statutes of 1939* in holding that the Missouri legislature by that section had delegated to a railroad company the power to condemn property for the same public use as that for which it was already being used simply because the present owner's corporate charter had expired or the operation was ultra vires, and despite the fact that the state had never questioned the right to own and operate the property.

The fifth question is whether or not the defendant Bridge Company was a union depot company or both a railroad and a union depot company, and whether the self-executing forfeiture statute of Missouri, originally not applicable to such companies, has been made applicable by later legislation. This question in turn depends on whether the court below has not held in conflict with Missouri decisions that the later Acts did make the self-executing forfeiture provisions applicable.

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* Set forth at p. 3 *supra.*

Reasons Relied on for the Granting of the Writ

As to Jurisdiction of the District Court

The question as to whether the District Court had jurisdiction of this action is one which this Court must consider *sua sponte*. *Mitchell* v. *Maurer*, 293 U. S. 237, 244. The question of the relationship between the State and Federal courts in condemnation cases, pursuant to state statutes which provide for the institution of the proceeding in a particular state court, and the true nature of such proceedings is one of paramount importance. Such cases, more than most, involve questions of the interpretation of state statutes and of state policies, and are peculiarly cases which should be determined in a State rather than the Federal court. Where a foreign corporation (such as the Burlington) avails itself of the right to condemn granted by the state, the provisions of the state statutes that the proceedings shall be instituted in a particular state court should be deemed a condition precedent to the exercise of the delegated right, i.e., the remedy or procedure shall be deemed a part of and inseparable from that delegated right.*

The question was considered in this Court in *Madisonville Co. v. St. Bernard Mining Co.*, 196 U. S. 239. The Court in a five to four decision upheld the jurisdiction of the Federal Court in a case where plaintiff condemnor was a resident and the defendant a non-resident landowner who removed the cause to the Federal Court. The majority opinion of Mr. Justice Harlan was concurred by Justices Brown, White, McKenna and Day. The dissenting opinion of Mr. Justice Holmes, concurred in by Justices Fuller, Brewer and Peckham, sets forth the reasons why the

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* *In State ex rel. St. Louis* v. *Beck*, 333 Mo. 1119 at 1123, the Court said:

> "The jurisdiction of Courts over eminent domain proceedings is wholly statutory and no court has jurisdiction in such matters, except in so far as it is given jurisdiction by the provisions of the Statute" (2 Nichols, Eminent Domain (2 Ed.) Sec. 425, p. 1121).

determination of the question as to the right to condemn, as distinguished from the mere fixation of damages, is not a case or controversy, and why the exercise of the jurisdiction by a Federal court is an interference with the sovereign right of the state to prescribe the particular state court in which proceedings are to be instituted. The importance of the question and the cogency of the reasoning of the opinion of Mr. Justice Holmes justifies a reconsideration of the question. The views of Mr. Justice Holmes are also supported by the following cases in addition to those cited by him:

Burrill v. *Locomobile Co.*, 258 U. S. 34;
City Bank Farmers Trust Co. v. *Schnader*, 291 U. S. 24.

A determination that there is no jurisdiction in the Federal Court would in nowise impair existing judgments of condemnation under state statutes which have been rendered in Federal courts as all such judgments are *res adjudicata*, because the absence of Federal jurisdiction *could* have been raised in those proceedings, and, therefore, must be deemed to have been raised and determined in favor of such jurisdiction.

Jackson v. *Irving Trust Company*, 311 U. S. 494;
Chicot County Draining District v. *Baxter State Bank*, 308 U. S. 371;
Stoll v. *Gottlieb*, 305 U. S. 165;
American Surety Company v. *Baldwin*, 287 U. S. 156.

As to forum non conveniens or the equivalent doctrine of appropriate forum

Even if the District Court had jurisdiction, such jurisdiction should not have been taken under the doctrine of *forum non conveniens*, or appropriate forum,* and the

* The most recent dismissal is found in *Meredith* v. *City of Winter Haven*, 134 F. (2d) 202 (C. C. A. 5th), decided February 3, 1943, where, as here, the state law was not clear.

assumption of jurisdiction was contrary to recent pronouncements of this Court* While this question was not presented below, this Court may nevertheless determine the questions as it did in *R. R. Commission of Texas* v. *Pullman Company*, 312 U. S. 496, and in *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171, where the question was not raised below.

In *Canada Malting Co.* v. *Paterson Steamships, Inc.*, 285 U. S. 413, 422, Mr. Justice Brandeis speaking for a unanimous Court, said:

> "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity *and of law* also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal" (Italics supplied).

In Rogers v. *Guaranty Trust Co.*, 288 U. S. 123, 130, this Court said:

> "While the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. Canada Malting Co. *v.* Paterson Co., 285 U. S. 413, 422, and authorities cited. It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an

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* In *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171, this Court said:

> "We granted the petition for certiorari because of the doubtful propriety of the District Court and of the Circuit Court of Appeals undertaking to decide such an important question of Illinois law instead of remitting the parties to the State Courts for litigation of the State questions involved in the case."

> appropriate forum. Langnes *v.* Green, 282 U. S. 531, 535, 541. Heine *v.* New York Life Ins. Co., 50 F. (2d) 382.'"*

In *Georgia* v. *Chattanooga,* 264 U. S. 472, 483, a condemnation case instituted by an original bill filed in this court, the court applied these principles specifically to a case of that character. The court said:

> "Its [plaintiff's] contention that the requisite power to condemn has not been delegated to the city involves a consideration of the meaning and proper application of the laws of Tennessee, and it is especially appropriate that the Tennessee courts shall first decide that question."

Other recent cases in this Court which have remitted state questions to the State court are:

Chicago v. *Fieldcrest Dairies,* 316 U. S. 168;
R. R. Commission of Texas v. *Pullman,* 312 U. S. 496;
Thompson v. *Magnolia Co.,* 309 U. S. 478;
General American Tank Car Corp. v. *El Dorado Terminal Co.,* 308 U. S. 422.

See:

Public Utilities Com. v. *United Fuel Gas Co.,* 87 Law ed. 310, 313;
54 Harvard Law Review 1379, 1389, cited in *Chicago* v. *Fieldcrest Dairies, supra.*

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* In *Heine* v. *New York Life Ins. Co.,* 50 F. (2d) 382 cited with approval above, the action was brought *at law* in Oregon, by citizens of Germany against a New York corporation and jurisdiction rejected despite the provision of 28 U. S. C. A. § 41 granting the District Court jurisdiction of all suits of a civil nature of common law or in equity * * * between Citizens of a State and foreign States, citizens or subjects * * *." The application of the doctrine of forum non conveniens has not been limited to actions in equity as pointed out in 54 Harvard Law Review pp. 1379, 1389.

One of the determinative questions in the case is as to the construction of Section 1512 R. S. Mo. 1939 and specifically is whether any corporation, *de facto* or otherwise, which for many years has devoted its property to the public service, has been recognized as an existing corporation by the state, has satisfactorily served the public and cannot abandon that service, may nevertheless have its property condemned by another public service corporation which intends to devote the property to precisely the same public use. This question has never been decided by the Missouri courts. Another question which is a question of general law, and which has also never been decided by the Missouri courts, is whether the doctrine that there can be no estoppel against condemnation because the property cannot be withdrawn from condemnation if needed in the public interest should be extended so as to preclude the defense here that there is an estoppel against urging that the corporate owner of the property already dedicated to the public use has forfeited its charter or is operating *ultra vires.*

All of these intricate questions are peculiarly within the province of the state courts to decide.* The Burlington could have filed its condemnation complaint in the state courts and there is no reason to invoke the jurisdiction of the Federal Court to determine state issues in a non-transitory action. There is no sound reason why a foreign corporation seeking to avail itself of the privilege of condemnation granted by a foreign state should have the right to have the Federal court determine local questions or questions of policy and general law *as against residents of that state* whose property is sought to be condemned, merely

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* It is to be noted that none of the Circuit Judges ever practiced law in the State of Missouri and cannot be assumed to be familiar with the history of the statutes involved, the local conditions to which they apply and the character of the state's laws. (*Thompson* v. *Cons. Gas Co.*, 300 U. S. 55, 75).

because the corporation happens to be a citizen of another state. The state itself would have no right to invoke the Federal Court.

Since the decision in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, the question as to whether jurisdiction should be declined, where questions of general law are involved, has become an even more important one because under the doctrine of that case the Federal court is bound to follow State Court decisions no matter how ancient—decided under conditions and State policy wholly different from those existing at the present time*—in the present situation decisions prior to the enactment of the Public Service Commission law which affects the right to abandon property devoted to a public use. In the State Courts those old cases might not now be followed.

So, too, it might well be that after a fuller consideration, the State Supreme Court might now hold in accordance with the probable weight of authority in this country that the forfeiture statute of Missouri is not self-executing. The District judge stated that if at liberty to do so, he would so hold (R. 117).

The language of this Court in *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 484, is apposite:

> "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction— been determined contrary to the law of the State, which in such matters is supreme."

In *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168, 172 this Court said:

> "The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast—a prediction as

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* A persuasive elaboration of this argument is found in the very recent case of *Meredith* v. *City of Winter Haven,* 134 F. (2d) 202, 206, 207 (C. C. A. 5th) in which jurisdiction was declined.

to the ultimate decision of the Supreme Court of Illinois."

The resort to the Federal Courts under the circumstances as here disclosed is probably in conflict with the recent cases in this court above referred to, and such use of the Federal Courts should be denied under the doctrine of *forum non conveniens* or its equivalent.

As to the availability of the defense of waiver or estoppel

The conclusion of the Circuit Court of Appeals that the defendants may not urge the waiver, acquiescence or estoppel of the Burlington to contend that the Bridge Company's charter was forfeited or its acts *ultra vires,* finds no support in existing authorities, is probably untenable and, therefore, is probably in conflict with the rule which the Supreme Court of Missouri will announce when the question reaches that court.* None of the cases in Missouri or elsewhere cited by the Circuit Court of Appeals in support of the court dismissal of the defendants' contention sustains the conclusion or even considered the question. All the cases relied on in that court were cases where a private agreement was urged as a defense to any condemnation, but the property sought to be condemned was not being actually devoted to the same public use and the result of the enforcement of the agreement would have been permanently to withdraw the property from such use. The inapplicability of the principle underlying those cases is made evident when the reason for the rule is borne in mind, namely, that no private agreement of the parties should deprive the public of the right to condemn property which may be needed in the public interest. In none of the cases cited by the Circuit Court to support its conclusion was the property already devoted to the same public use and therefore the

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* *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 206, where this Court said:

> "Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the State law as yet unannounced by the highest court of the State."

effect of the enforcement of the private contract involved in those cases would have been to deprive the public of the use of the property for a public purpose. In the present case, however, the property is now and for many years *has been* satisfactorily devoted to precisely the same public use to which the Burlington seeks to put it, and accordingly the public interest is here nowise involved. The public is not interested as to whether A or B operates the property, and even if the Burlington be estopped from urging forfeiture and *ultra vires* because of its relationship as a stockholder, and in effect co-owner of the property, the property will still remain in the public use and cannot be withdrawn therefrom without permission of the State through its delegate, the Public Service Commission. *State ex rel. P. S. C.* v. *Mo. Southern R. Co.,* 279 Mo. 455. The Burlington can still condemn provided it shows that the property is not being used for the same public use to which it seeks to put it.

As to the construction of Section 1512 R. S. Mo., 1939.

The court below has construed this section, quoted above at page 3, as delegating to a railroad corporation the power to condemn property already devoted to a public use for the same use unless the corporation which has dedicated the property to the public use is a *de jure* corporation operating *intra vires.* As appears in the accompanying brief, page 30, this conclusion is in conflict with principles recognized in Missouri that the state cannot delegate the right to condemn for the same use.* No Missouri case supports the construction of the court below and it is probably in conflict with the Missouri cases which have indicated the purpose of this section, and the determination is probably in conflict with the rule which the Supreme Court of Missouri will announce when the question reaches that court. The construction of the statute by the court below leads to absurd results. That construction cannot be limited to a case where the proposed use is the same as the old use and where, therefore, the public is not affected.

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* That the present and proposed use are the same is uncontradicted (R. 730, 765-6, 282).

If the construction is correct, the Bridge Company cannot prevent the condemnation of its tracks and rights of way for a public use other than a railroad use and which would interfere with or terminate the present use of the property. The result would be that the hundred and more industries of North Kansas City could be deprived of all existing railroad service simply because the Bridge Company, although it has devoted its property to a public use for a quarter of a century without interference by the state, has either forfeited its corporate charter or has been acting *ultra vires*. Having in mind the fact that this service cannot be abandoned voluntarily (*State ex rel. P. S. C.* v. *Missouri Southern Ry. Co.*, 279 Mo. 455),* it is inconceivable at the present time that this old statute of 1866** should be so construed that the present use could be terminated at the instance of another public service corporaion and the industries deprived of all transportation service. An important question of construction not determined by the Missouri courts arises.

As to the applicability of the self-executing forfeiture provisions

The conclusion of the Circuit Court of Appeals that the self-executing forfeiture provisions of the Missouri statute (section 5248 R. S. Mo. 1939, quoted *supra*), which were originally not applicable to union depot companies, have become applicable by virtue of the statutes of 1879 and 1899, is probably in conflict with applicable local decisions which have held that revisions and amendments, such as here were made, do not make all provisions of the revisions applicable where they were inapplicable before. The provisions and history of the two statutes referred to and the applicable Missouri cases are set forth in Point II of the annexed brief at p. 38 *infra*, and it is there shown that the decision below is probably in conflict with the Missouri cases.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal

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* The Commission held that the Bridge Company is under the jurisdiction of the Commission (p. 14 footnote).

** See p. 35 *infra*.

of this Court directed to the Judges of the United States Circuit Court of Appeals for the Eight Circuit commanding them to certify and send to this Court a transcript of the record in this case to the end that the decree of said court may be reviewed and reversed to the extent that it affirms the judgment of the District Court, and the cause remanded to the District Court with instructions to dismiss the case, or if this relief be denied that it be remitted to the Circuit Court of Appeals for the Eighth Circuit for decision of the questions left undetermined in that court (following the practice in *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 241, and *Klaxon Company* v. *Stenton Co.*, 313 U. S. 487, 498), and that your petitioners may have such other, further or different relief in the premises as to this Court may seem appropriate.

NORTH KANSAS CITY BRIDGE AND RAILROAD COMPANY,
Petitioner,

By GODFREY GOLDMARK,
HENRY N. ESS,
Counsel.

NORTH KANSAS CITY DEVELOPMENT COMPANY,
Petitioner,

By GODFREY GOLDMARK,
HENRY N. ESS,
Counsel.

NORTH KANSAS CITY LAND AND IMPROVEMENT ASSOCIATION,

By GODFREY GOLDMARK,
HENRY N. ESS,
Counsel.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court (R. 116) is not reported.

The opinion of the Circuit Court of Appeals (R. 2014) is reported in 134 F. (2d) 142.

Jurisdiction

Jurisdiction of this Court is invoked under section 248 of the Judicial Code as amended by the Act February 13, 1925 (U. S. C. Title 28, section 347(a)).

Statement of the Case

The facts in so far as material to this application are set forth in the petition.

Specification of Errors

It is submitted that the Circuit Court of Appeals erred:

(1) in affirming so much of the judgment of the District Court as adjudicated that the plaintiff had the right to condemn the property of the defendants;

(2) in failing to dismiss the action upon the ground that the District Court had no jurisdiction, or upon the ground that the District Court should not have assumed jurisdiction under the doctrine of *forum non conveniens;*

(3) in failing to hold that the Burlington was estopped by past dealings and previous recognition from asserting that the Bridge Company has no legal authority to own or operate the property sought to be condemned, and in failing to consider the evidence in support of such contention;

(4) in holding that the plaintiff had the right to condemn the property of the defendants under the provisions of section 1512 R. S. Mo. 1939, because such property was not devoted to a railroad use by a corporation which had the power and right under the Missouri statutes and under its articles of association to engage in such operations;

(5) in failing to hold that the Bridge Company was a union depot company and that the forfeiture provisions of section 5248 R. S. Mo. 1939 were inapplicable to such a corporation.

The specifications other than (4) and (5) have been sufficiently discussed in the foregoing petition.

POINT I

IN MISSOURI AND ELSEWHERE THE RULE IS ESTABLISHED THAT THE STATE MAY DELEGATE THE RIGHT TO CONDEMN FOR A SUPERIOR USE PROPERTY ALREADY DEDICATED TO A PUBLIC USE, BUT MAY NOT DELEGATE THE RIGHT TO CONDEMN FOR THE SAME USE PROPERTY ALREADY DEDICATED TO A PUBLIC USE. SECTION 1512 WAS NOT INTENDED TO CHANGE THE FOREGOING RULES BUT AS WAS HELD BY THE SUPREME COURT OF MISSOURI IT WAS INTENDED SIMPLY AS A LEGISLATIVE DECLARATION THAT A RAILROAD USE WAS NOT SUPERIOR TO AN EXISTING LAWFUL PUBLIC USE. NO MISSOURI CASE HOLDS THAT THERE MAY BE CONDEMNATION FOR THE SAME USE SOLELY BECAUSE THE OWNER'S CHARTER HAS BEEN FORFEITED OR THE OWNERSHIP IS ULTRA VIRES ALTHOUGH THE STATE HAS ACQUIESCED IN THE CONTINUED PUBLIC USE.

The following principles are now well established in Missouri and elsewhere: (1) Property held for a public use may nevertheless be taken for a superior public use if the express power so to take has been delegated. (2) Property held for a public use may nevertheless be taken

for a different but not a superior use if the express power so to take has been delegated *and* if the taking will not materially interfere with the existing use. (3) Property held for a public use may not be taken for the same public use under a delegated power to take because under such circumstances the taking is really a matter of private concern and not for a public purpose.

> Lewis on Eminent Domain (3rd Edition), section 440, page 791.

In *Kansas & Texas Coal Ry. Co.* v. *Northwestern Coal & Mining Co.*, 161 Mo. 288, at 321, the court said:

> "It has been decided in this and other jurisdictions, and is the accepted law, that the fact that land sought to be condemned for a public use is held, owned and used by a corporation organized for private gain is no defense to the right of condemnation. [Twelfth Street Market Co. *v.* P. & R. T. R. Co., 142 Pa. St. 580; Lewis on Em. Dom., sec. 274, and cases cited].
>
> "The same principle is declared even where the property sought to be condemned is held and used by a corporation possessing the power of eminent domain and is using the same for a public purpose. [St. L. H. & H. K. Ry. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82; Kansas City *v.* Oil Co., 140 Mo. 458; Kansas City Belt R. R. Co. *v.* K. C. St. L. & Chicago R. R. Co., 118 Mo. 599; Lewis on Em. Dom., sec. 274, and cases cited.] *The only qualification to this rule is that such property cannot be taken from one corporation by another corporation, to be used for the same purpose in the same manner that it was used by the corporation that first appropriated it to such use and purpose.* [Lewis on Em. Dom., sec. 276.] In other words, every corporation holds property subject to the right of the State to take it for another public use, whenever in the discretion of the Legislature the exigencies require its use for such other purpose, and this is true even as to the franchise itself of any corporation." (Italics ours)

And in that case the court also said at page 322:

> "It goes without saying that one railroad company could not condemn the right of way of another railroad company and use it for the same purpose as the first company was using it."

In Lewis on Eminent Domain (3rd), supra, it is said at section 440:

> "But the legislature cannot take the property of A, such as a toll-bridge, and transfer it to B to be still used as a toll-bridge by B in the same manner as it had previously been by A. This would simply be taking the property of A and giving it to B, which the legislature is powerless to do. 'Where there is no change in the use there cannot be a change in ownership under the law of eminent domain'."

The following cases support this statement:

West River Bridge Co. v. *Dix,* 6 How. (U. S.) 507, 537;

St. Louis H. & K. C. Ry. Co., v. *Hannibal Union Depot Co.,* 125 Mo. 82;

City of Hannibal v. *Hannibal etc. R. R. Co.,* 49 Mo. 480;

Southern Co. v. *Stone,* 174 Mo. 1.

In *K. C. Suburban Belt Ry. Co.* v. *K. C. St. L. & C. Ry. Co.,* 118 Mo. 599, 615, the court quoted with approval from *Appeal of Pittsburgh Junction R. R. Co.,* 122 Pa. St. 511, where the court said:

> "The principle is well settled that the lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as a right of way by another railroad company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy."

Another principle well established in Missouri is that only the state can question executed ultra vires acts. Unless the attack is authorized by express legislative permis-

sion. In *Conn. Mututal Life Insurance Co.* v. *Smith,* 117 Mo. 261, the court said:

> "The settled law of this State, as illustrated by frequent instances in this court, is that the capacity of a corporation to take a conveyance of land cannot, after the transfer has reached completion, be called in question in a collateral way, but by the State and not by a private suitor. This doctrine applies to all classes of actions and in every variety of cases. [Citing cases]
>
> "The only exception to the rule which prohibits collateral attack by private persons on such conveyances or other unauthorized acts of a corporation, is where such attack is authorized by express legislative permission." [Citing cases]

Still another principle established in Missouri since the enactment of the Public Service Law in 1913 (Mo. Laws 1913, p. 1588; Mo. R. S. 1939, p. 35) is that the right to regulate the use of property depends on whether it is in fact being devoted to a public use and does not depend on the charter powers of the user.*

> *State ex rel. Danciger* v. *Public Service Commission,* 275 Mo. 483.

And properties devoted to public use cannot be voluntarily withdrawn therefrom even if the charter of the corporate owner does not authorize such use.

> *State ex rel. P. S. C.* v. *Missouri Southern R. R. Co.,* 279 Mo. 455.

There are a few old decisions in states other than Missouri holding that property voluntarily devoted to a public use *which use might be discontinued at any time* could be condemned the same as if devoted to a private use even though the public would thereby be deprived of an existing service. (Lewis on Eminent Domain, 3rd, §445.) But these cases obviously cannot be controlling now in view of the fact that

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* The Commission has held the Bridge Co. to be under the jurisdiction of the Commission (p. 14 footnote).

under Public Service Laws property devoted to the public service cannot be withdrawn therefrom at will. The cases seem to be unsound if by the condemnation the public is deprived of an existing public service.

Having in mind these principles, the question here is what was the legislative intent underlying section 1512?* Does it purport to delegate the power to take property for a public use which is already dedicated to the same use** for which it is sought to be taken simply because the existing owner is a corporation which acquired and operated the property beyond its charter powers although that owner cannot voluntarily abandon such use and the State has acquiesced in the continued public use.

In *K. & T. Coal Ry. Co.* v. *Northwestern Coal & Mining Co.*, 161 Mo. 288, *supra*, the court thus stated the purpose of section 1512, at page 322:

> "In the light of this constitutional provision and of these adjudications in this and even in other States that have no such constitutional reservation, it cannot be said that the Legislature intended by section 2741 [now 1512] to say, or had the constitutional right to say, that property held by any corporation, public or private, possessing or not possessing the power of eminent domain, should not be subject to condemnation for another or superior public use. *That section is a simple legislative declaration that the use of the land for railroad purposes is not a superior use to the use of the land by the company that owns it and has already devoted it to one use authorized by law. It goes without saying that one railroad company could not condemn the right of way of another railroad company, and use it for the same purpose as the first company was using it.*" (Italics ours.)

The statute as thus construed, therefore, obviously is not intended to delegate a power to condemn for the *same purpose*** as that to which the property is already devoted, but,

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* Quoted at page 3 *supra*.

** That the present use and proposed use are the same is uncontradicted (R. 730, 765-6, 282).

as the Missouri court held, is a mere recognition of the principle that property may be condemned for *superior* use and that a railroad use is not a superior use. Whether or not the legislature of Missouri could enact a statute that property being operated ultra vires or by a corporation whose charter is forfeited could be condemned by another railroad company for the same use, need not be determined at this time. The important point is that there is no indication of intent to delegate any such power to railroad companies.

While the immediate reason for the enactment of section 1512 is not discussed by the Missouri Supreme Court, it is believed its origin was this: In 1866 when the statute was originally enacted (Mo. Laws 1865-1866, c. 73, §8), it applied only to railroad and telegraph companies. Such companies were then obtaining Federal grants to extend their lines beyond the Missouri River. There was possibly a question as to how far these Federal grants might be claimed to make a public use for railroads and telegraphs a superior use and therefore permit condemnation of property already devoted to a different public use. To clarify the situation, the 1866 Act was evidently passed to make it certain that a use for railroad and telegraph companies was not a superior use and that the general principle (set forth above) was applicable,—that land already dedicated to a public use could not be taken for another use which would materially interfere with the existing use. In view of the statement of the Missouri Supreme Court as to the purpose of the Act, and in view of its probable history, and in view of the rules prohibiting delegation of the power to condemn for the same use, it seems clear that there was no legislative intent to have the statute apply to a case where the proposed use was the same as the public use to which the property was already dedicated. There is also no indication that it was the legislative intent by this statute to permit the taking of property for the same use simply because the user with the acquiescence of the State was operating ultra vires or despite the forfeiture of its charter, or that this statute was intended as a substitute for *quo warranto*.

A brief analysis should be made of the authorities which the court below cites to sustain its conclusion.

Kansas & T. Coal Ry. Co. v. *Northwestern Coal & Mining Co.*, 161 Mo. 288, does not sustain the court's conclusions for in that case while there was a wide discussion of various principles of condemnation, it there appeared that the property sought to be condemned was not being devoted to any public use at all. The condemnee was a private mining corporation which devoted its property to a private use. The court referred to the charter powers of the condemnee merely to show that the charter contemplated only a private use. There was not presented or decided the question whether property which, with the acquiescence of the State, has been dedicated to the public use for many years *by a corporation whose charter does contemplate a public use,* can be condemned for the same use simply because the operation is ultra vires. Indeed the court itself intimated that its answer to this question would be negative for its opinion clearly indicates that a corporate charter which does contemplate a public use cannot be attacked or questioned collaterally or in any manner except by *quo warranto* if the charter is regular on its face (161 Mo. at pp. 307, 308, 309).

Nor do the other authorities relied on by the court below in support of its conclusion in fact give such support. The court cites the Missouri Constitution, Article 12, section 7, which provides that no corporation shall engage in business other than that expressly authorized in its charter. The court overlooks the fact, however, that the Supreme Court has specifically held that these provisions but incorporate the applicable common law and that the ultra vires act cannot be questioned by anybody but the state in a *quo warranto* proceeding unless there is an express legislative permission to question it. *State ex rel American Surety* v. *Haid,* 325 Mo. 949; *Hill* v. *Rich Hill Coal Mining Co.,* 119 Mo. 9; *Schlitz* v. *Poultry Game Co.,* 287 Mo. 400, 408; *Illinois Fuel Co.* v. *M. & O. R. R. Co.,* 319 Mo. 899, 926.

In *Orpheum Theatre & Realty Co.* v. *Brokerage Co.*, 197 Mo. App. 661, also cited by the court, there was laid down the well established rule that where there is involved an executory contract ultra vires is a good defense.

In *Schlitz Brewing Co.* v. *Poultry & Game Co.*, 287 Mo. 400, ch 412, the Supreme Court said of the *Orpheum Theatre* case:

> "In so far as the remainder of the opinion in the case cited is concerned it is, if not *obiter*, out of accord with the settled rule in this State."

In *Hoagland* v. *Hannibal and St. Joseph R. R. Co.*, 39 Mo. 451, also cited by the court, an action was brought to recover for failure to deliver freight and it was insisted that the defendant was bound by express contract to carry and deliver. The court found that the railroad had no power to carry the freight over the particular line and held in accordance with well established authority that the executory contract was unenforcible.

It is difficult to see how these cases have any bearing upon the question here presented or justify the court's conclusion. The court below attempts to justify that conclusion by saying that the condemnation statute contemplates that the public interest can best be served in any event by allowing the property to be acquired for the same use by any corporation which has the specific power and obligation under its charter to make a legal and permanent dedication of it. There is nothing in the statute which justifies the holding that this was its purpose or that its purpose was other than that stated by the Missouri Court. Of course, the fallacy of the argument lies in the fact that if the construction is correct, the property may be taken not only for the same use but also may be taken for a different use *although not superior* and although it materially interferes with or terminates the existing use. If the court's construction is sound, any company having the power of eminent domain has had delegated to it the right to condemn this

railroad and to deprive the hundred and more industries in North Kansas City of railroad service. Any such company can condemn the property in such a way as to prevent further service and the courts would be powerless to grant relief simply because the actual construction of the road and its long operation never questioned by the State was beyond the express charter powers of the company, and despite the fact that the operation cannot be discontinued without State permission. It is submitted that this construction is absurd and one which cannot be other than detrimental to the public interest.

It is submitted, therefore, that the foregoing analysis of fundamental principles and the underlying purpose of section 1512 make it clear that the interpretation below of section 1512 conflicts with Missouri law and cannot be sustained. If and when the question reaches the Supreme Court of Missouri, it is submitted that a wholly contrary conclusion must be reached.

POINT II

THE COURT BELOW ERRED IN HOLDING THAT EVEN IF THE BRIDGE COMPANY WAS A UNION DEPOT COMPANY, OR BOTH A RAILROAD COMPANY AND A UNION DEPOT COMPANY, THE PROVISIONS OF SECTION 5248 OF THE REVISED STATUTES OF MISSOURI WERE APPLICABLE AND ITS CHARTER POWERS HAD BEEN FORFEITED. THE HOLDING IS IN CONFLICT WITH MISSOURI DECISIONS.

The court below did not determine whether the Bridge Company was in fact incorporated as a union depot company or both a railroad company and a union depot company, but held that even if it were, the provisions of section 5248* were applicable and its charter forfeited. Recognizing that union depot companies originally were provided

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* Quoted at p. 3, *supra*.

for by a separate Act, and "probably" recognizing the principle that the placing of this special Act in the revised statutes did not make the forfeiture provisions applicable to a union depot company, the court nevertheless found these provisions applicable because of two statutes passed, respectively, in 1879 and 1899 which the court held not to be revisions but specific legislative enactments which did make forfeiture provisions applicable to the union depot companies. This conclusion, it is submitted, was erroneous, contrary to Missouri decisions and based upon an erroneous interpretation of the statutes referred to.

Preliminarily it should be pointed out that the rule in Missouri is well established that " * * * the carrying of a Session Act into the revised statutes does not change its effect nor does its mere arrangement or location by the revisers make it part of the statute with which it is grouped so as to qualify its meaning." *Aloe* v. *Fidelity Mutual Life Association,* 164 Mo. 675, 696. So, too, it is well settled in Missouri that the act of a legislature in making the periodic revisions of the statutes required by the Constitution is deemed not to be a re-enactment of the various laws included in the revised statutes, but only a continuation of the prior laws conveniently arranged or codified. (*City of St. Louis* v. *Alexander,* 23 Mo. 483, 509; *City of Cape Girardeau* v. *Riley,* 52 Mo. 424, 428; *Paddock* v. *Missouri Pacific Railway Co.,* 155 Mo. 524, 536; *State* v. *Gantt,* 274 Mo. 480.)

In the *Paddock* case the court said with respect to the incorporation of the statute into the revised statutes " * * * the effect was no different from what it would have been if no such collation or revision had been made."

It is also the law of Missouri that where a statute repeals old sections and enacts new ones in place thereof, such statute is regarded simply as an amendment of the earlier sections and as a continuation thereof. *State* v. *Bradford,* 314 Mo. 684, 697; *Brown* v. *Marshall,* 241 Mo. 707, 728; *Belfast Investment Co.* v. *Curry,* 264 Mo. 483, 497; *State* v. *Ward,* 328 Mo. 658, 668-9; *State ex rel. Truman* v. *Jost,* 269 Mo. 248, 258.

On the other hand, it is the law of Missouri that where provisions of independent statutes are brought into the same article and chapter by a separate act of the legislature, and not merely by statutory revision, the provision thus brought in becomes applicable to the whole chapter. *Turner* v. *Missouri, Kansas, Texas R. Co.*, 346 Mo. 28; *Corley* v. *Montgomery*, 226 Mo. App. 795, 803.

The error of the court below consists, in applying the last principle above stated, to the facts with respect to the two acts referred to rather than the first principles enunciated with respect to the effect of the revisions and amendments.

As to the Act of 1871

In March 1871 statutory provision was made for the first time for the organization of union depot companies. This was done not as an amendment to the chapter of the General Statutes embodying the General Railroad Law, but as an original Act, the "Union Depot Act" (Missouri Laws 1871, page 53). This Act, unlike the General Railroad Law, made no provision for the forfeiture of the union depot corporation's charter. The then existing forfeiture provision of the general railroad chapter of the General Statutes did not apply to a union depot corporation because that provision referred to, and was thereby limited, specifically to "any corporation formed under this Act." Subsequently in 1872, because of one of the periodic revisions of the Missouri statutes, the provisions of the Union Depot Act were incorporated into the chapter and article dealing with the organization of railroad corporations which contained the forfeiture provisions. Under the rule above stated, this incorporation did not make the forfeiture provisions applicable to a union depot company and this, the court below said, "probably is correct."

As to the Act of 1879

In 1879 the legislature passed an Act, approved May 31, 1879, entitled:

> "Chapter 21, Railroad Companies—Article 2.
> An act to revise and amend Chapters 63, 64, 65 and 66 of the General Statutes of the State of Missouri, concerning corporations,
> Be it enacted by the General Assembly of the State of Missouri, as follows:
>
> Railroad Companies.
> Incorporation."

This Act of 1879 re-enacted Section 1 of the original Depot Act of 1871, without change, and enacted Section 4 or of the original Union Depot Act, with the last proviso eliminated. As stated, the Act of 1879 also reenacted the forfeiture section, as Section 823 of the same "chapter 21 Railroad Companies—Art. 2." It is claimed that by this enactment the forfeiture provisions became applicable to union depot companies.

However, the history of that Act* shows that this is not the case:

In 1879, pursuant to the requirements of the Missouri Constitution of 1875, it became necessary for the General

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* This legislative history appears from the "Joint and Concurrent Resolutions in Relation to the Revision of the Statutes of the State of Missouri," printed in the published Laws of Missouri, 1879, p. 257, under the heading "Resolutions," a copy whereof is presented as Appendix "B" to this brief; from the preface of the revisers to the Revised Statutes of 1879, a copy whereof is presented herein as Appendix "C"; and from Sections 7 and 8 of an act entitled "Statutes: Revision and Publication of. An Act Declaratory of the Revised Statutes of the State of Missouri and Their Effect and to Provide for the Collation, Editing, Printing, Binding, Publishing and Distributing the Same," Laws of Missouri, 1879, p. 210. A copy of Section 7 is printed herein in Appendix "D". The provisions of Section 8 are printed in the body of this brief, *infra*.

Assembly to revise the Missouri statutes. In order to comply therewith the General Assembly in 1879 adopted the procedure set forth in the Joint Resolution appearing in Appendix "B". It appointed a committee and provided that its duty should be to revise all the statute laws of the state and that " * * * *as said committee shall complete the revision of each separate act or subject, contained in the present statutes* or session acts, or shall submit an act upon any new subject, the same shall be reported to either house for adoption or approval, or to be otherwise disposed of by the General Assembly." (Paragraph First of Appendix "B") It further provided that " * * * at the conclusion of the revision of all the laws and the adoption thereof, a bill or bills may be offered and acted upon, *declaratory of such revision,* and providing for carrying the same into effect, and for the preparation of convenient indices, marginal notes, references to court devisions and publishing and distributing the same" (Paragraph Fifth of Appendix "B").

The General Assembly also passed an act (Laws of Missouri, 1879, p. 210) entitled "Statutes: Revision and Publication of. An Act Declaratory of the Revised Statutes of the State of Missouri and Their Effect, and to Provide for the Collation, Editing, Printing, Binding, Publishing and Distributing the Same." This provided for the publication of the Revised Statutes in two volumes and that

> "Sec. 8. All acts of a general nature, revised and amended and re-enacted at the present session of the general assembly, *so soon as such acts shall take effect* shall be taken and construed as repealing all prior laws relating to the same subject, but the provisions of the Revised Statutes, so far as they are the same as those of prior laws, *shall be construed as a continuation of such laws and not as new enactments."* (Italics ours.)

All of the more important subjects in the statutes were thereupon revised, reported and passed in the same fashion

as other bills. (See Reviser's preface in Appendix "C.") Ultimately, the work of revision having been completed so far as was practicable to be done by legislation, the General Assembly by an act approved May 31, 1879 (the same day as the act relied upon below), continued a portion of the original committee in session, after the General Assembly's adjournment, to collate, annotate and prepare the work for publication. (See Appendix "C.") The committee then completed the revision as required, *i. e.*, having annotated the same and published the same as the Revised Statutes of 1879. What was thus published was the declaratory revision provided for in the Joint Resolution. In their preface to this declaratory revision the revisers who annotated the same state:

> "To each section has also been added a reference showing the date of the last enactment, the page and section if taken from the session acts, or the page and section if taken from the revision of 1865; or if a new or amended section, it is so indicated, and wherever the words 'amended' and 'new section' occur in the references, they are to be understood as applying exclusively to revised bills." (See Appendix "C.")

When the declaratory or permanent Revised Statutes of 1879 were printed, Section 823, the forfeiture section upon which the Burlington relies, bore the revisers' notation as follows:

> "(Laws 1869, p. 73-m)."

Section 826 providing for the incorporation of union depot companies bore the revisers' notation:

> "(Laws 1871, p. 59, Section 1)."

Section 827 setting forth the powers of union depot companies bore the reviser's notation:

> "(Laws 1871, p. 60, Section 4 amended)."

One further piece of legislative history which should be noted is that Section 7 of the act entitled "An Act Declaratory of the Revised Statutes," etc., provided that all acts temporary in nature need not be published in the Revised Statutes.* That probably explains why the Act of 1879, upon which the Burlington relies, was never published.

The conclusion of the court below as to the 1879 act conflicts with the decision of the Supreme Court of Missouri in the case of *Paddock* v. *Mo. Pac. Ry. Co.*, 155 Mo. 524. That case involved a statute adopted by the Thirty-fifth General Assemly of Missouri revising a portion of the general statutes and session laws then in existence. That statute made two different earlier acts part of one chapter, which then was incorporated in the permanent Revised Statutes of 1889 as Chapter 42. It was claimed that (155 Mo. at 535) said chapter "was enacted as a new act by the Thirty-fifth General Assembly, and hence the two acts referred to, though entirely different before, became a completely new act, and all of its parts must be construed together, * * *." This is exactly the same contention as the Burlington made below. However, that contention was rejected by the Missouri Supreme Court, which said (155 Mo., at p. 535):

> "The intention of the legislature when the Revised Statutes were adopted, is clearly expressed in Section 6606, Revised Statutes 1889, where it is provided: 'All acts of a general nature, revised and amended and re-enacted at the present session of the General Assembly, as soon as such acts take effect, shall be taken and construed as repealing all prior laws relating to the same subject; but the provisions of the Revised Statutes, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws, and not as new enactments.'**

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* Printed in Appendix "D."

** The provision relied on by the court is identical with Section 8 of "An Act Declaratory of, etc." quoted at p. 42, *supra.*

"Sections 2590 and 2591, as also Sections 2593 to 2597, inclusive, of the Revised Statutes 1889, as above shown, are exactly the same as the laws of March 31st and March 23d, respectively, and therefore those sections must be treated, under this legislative direction, as mere continuations of those laws and not as new enactments. They were entirely different laws before and they continued to be different notwithstanding they were carried into the Revised Statutes and placed in the same article of the same chapter of the Revised Statutes, and *notwithstanding that they may appear in the bill enacted by the Thirty-fifth General Assembly which revised chapter 42.* This has been the uniform ruling of this court on this question. (*St. Louis* v. *Alexander,* 23 Mo. 483; *City of Cape Girardeau* v. *Riley,* 52 Mo. loc. cit. 428; *State ex rel. Att'y-Genl.* v. *Heidorn,* 74 Mo. 410; *Pool* v. *Brown,* 98 Mo. loc. cit. 680.)" (Italics ours.)

To the same effect, also involving acts similar to the Act of 1879, see:

Timson v. *Coal & Coke Co.,* 220 Mo. 580, at pages 591-2, 119 S. W. 565, at p. 567 (*en banc*);

Dart v. *Bagley,* 110 Mo. 42, at p. 52, 19 S. W. 311, at p. 313;

State ex rel. Att'y-Genl. v. *Heidorn,* 74 Mo. 410, at pp. 411-412.

It appears from the foregoing history of the Act of 1879 and the State Court decisions that it was in legal effect no more than a revision of the existing law and a mere continuation thereof, and that accordingly it did not make the forfeiture provisions theretofore contained in the Railroad Act applicable to union depot companies.

As to the Act of 1899

This Act, Laws of 1899, page 124, was entitled

"An Act to repeal §§ 2667 and 2668, Revised Statutes of Missouri, 1889, and amendments thereto,

> concerning union depots and union depot corporations, and to enact new sections, to be known as §§ 2667 and 2668."

As amended, the sections contained the provisions now contained in 5251 and 5252 of the Revised Statutes of Missouri, 1939, which appear in Appendix A hereto. The contention is that this repeal of the two sections of 1889, Revised Statutes, and the enactment of new sections in lieu thereof made the forfeiture provisions applicable to union depot companies. The fallacy of this contention lies in the assumption that the sections enacted in lieu of the repeal sections are regarded as new enactments under Missouri law. The cases cited above show beyond question that a statute which repeals old sections and enacts now ones in place thereof is regarded simply as an amendment of the earlier sections and as a continuation thereof as amended. Thus, in *State* v. *Bradford,* 314 Mo. 684, the court said:

> "While the act of 1921, page 206, purports to repeal section 3973 of Revised Statutes 1919, yet, as the same law was reenacted with a modification, it is simply an amendment of the law of 1919, and is a continuation of the latter as amended. Brown *v.* Marshall, 241 Mo. loc. cit. 728, 145 S. W. 810, and cases cited; State ex rel. *v.* Jost, 269 Mo. loc. cit. 258, 191 S. W. 38, and cases cited."

And in *Brown* v. *Marshall,* 241 Mo. 707, at 728, the Court said:

> "A subsequent act of the Legislature, repealing and re-enacting, at the same time, a prexisting statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. State ex rel. *v.* Mason, 153 Mo. 23, loc. cit. 58, 59 (54 S. W. 524); State ex rel. *v.* County Court, 53 Mo. 128 loc. cit. 129, 130; Smith *v.* People, 47 N. Y. 330."

In view of the foregoing it is submitted that the decision below is in conflict with the Missouri cases in holding that the

forfeiture provisions become applicable to a union depot company by virtue of the enactments of 1879 and 1899.

In order to sustain its conclusion and to overcome the argument that the use of the word "road" in the forfeiture statute* obviously referred to a railroad having termini, the court was obliged to hold that by the mere passing of the Acts of 1879 and 1899 and, as the court held, the mere incorporation of the forfeiture section into the railroad provisions, the word "road" thereby became expanded so as, to be intended as a "generic reference to all of the special undertakings in the charter of either a railroad company or a union depot company, or a hybrid combination of both." In order to fortify this conclusion, the court found it necessary to say "that there would seem to be as much legislative reason for summarily laying at rest the powers of a union depot company possessed of the same privilege of eminent domain as in the case of a railroad company with respect to any of the special undertakings of its charter which it did not fulfill in the time and manner prescribed by the forfeiture statute." Nowhere in the legislative history is there any indication of such a reason for making the forfeiture statute applicable to union depot companies, and the union depot sections specifically provide that the incorporators are authorized "to form themselves into a corporation *under the general laws of this state relating to private corporations,*" thereby indicating that the corporation was being formed under the general laws rather than under the railroad law. Irrespective of this, the obvious fallacy of the court's reasoning lies in the fact that the "road" of a railroad company is recognized to mean the specific route over which its tracks were to run from terminus to terminus, and there is good reason to cause a forfeiture of the right to construct such a road within the statutory period so as to permit the same territory to be used by another railroad. In the case of a union depot

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* Quoted at p. 3, *supra.*

company, the statute does not require that any route or road need be set forth and here the charter of the Bridge Company provides that it may build a union depot either in Kansas City or in any part of the state (see page 9, *supra*). The reason which underlies the necessity for the forfeiture of the charter for failure to construct the "road" can have no application to a corporation which has not specified the specific place where its union depot is to be constructed.

If there is "as much legislative reason" for applying the drastic penalty of forfeiture to a union depot company as there is to a railroad company, is it not strange that the reason did not impress itself upon the legislators in 1871 when the Union Depot Act was first adopted and that the need for a forfeiture provision was not felt until 1879 or 1899? Is it not curious, also, that the legislature thought it necessary to provide for the forfeiture of a corporation organized to operate a railroad depot, whereas to this day it has seen no such necessity in the case of a corporation organized to operate a railroad bridge,—and this notwithstanding that such a bridge corporation has eminent domain privileges and the power to operate not only its bridge but extensive tracks and depots and terminal facilities on land? (Sections 5380-5382, R. S. Mo. 1939). *So. Ill. & Mo. Bridge Co.* v. *Stone,* 194 Mo. 175, aff'd. 206 U. S. 267.

POINT III

FOR THE REASONS SET FORTH IN THIS BRIEF AND THE FOREGOING PETITION THE APPLICATION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

GODFREY GOLDMARK,
HENRY N. ESS,
Counsel for Petitioners.

Appendix "A"

UNION DEPOT PROVISIONS OF THE REVISED STATUTES
REVISED STATUTES MISSOURI 1939 §§ 5251, 5252.

Sec. 5251. Union stations—corporation for construction of—railroad company may construct.—In order to facilitate the public convenience and safety in the transmission of goods and passengers in and in the neighborhood of large cities, from one railroad to another, and to prevent the unnecessary expense, inconvenience and loss attending the accumulation of a number of stations, any number of persons not less than five, or any such number of persons, not less than five, and any railroad company or companies, are hereby authorized to form themselves into a corporation under the general laws of this state, relating to private corporation for the purpose of construcing, establishing and maintaining a union station for passengers or freight depots, or for both, in or in the neighborhood of any city of this state, with the necessary offices and rooms convenient therefor, and the appurtenances thereto, and, for that purpose, may make and sign articles in which shall be stated the number of years the same is to continue, the city in which the same is to be located, the amount of the capital stock of said company, which shall not exceed ten millions of dollars, the amount of each share of stock, the names and places of resident of its directors who shall manage its affairs for the first year and until others are chosen in their place, the number of its directors, which shall not be less than five nor more than twenty, and shall also state the amount of stock taken by each subscriber. And any railroad company may construct, build, operate and maintain a union station in, or in the neighborhood of any city of this state, for passengers or freight depots, or for both, with the necessary offices and rooms convenient therefor, and the appurtenances thereto, and shall have the like powers in con-

nection with any such union station or depots, or both, as are possessed by union depot companies formed under this section.

Sec. 5252. Powers of such corporation or railroad company—Every corporation formed under the preceding section, and every railroad company which may build and operate a union station or depot under said section, shall, in addition to the general powers conferred by the laws of this state, in relation to corporations, have powers: First, to take and hold for the purposes mentioned in said section such real estate and railroad and other property as it may acquire by conveyance to said corporation, and such real estate as it may acquire under the provisions of said previous section, by condemnation; second, to take, occupy and condemn any lands and real estate needed for the establishment of such union station or depot, or the terminal facilities in connection therewith, and the same proceedings shall be had therefor as provided by law relating to the appropriation and valuation of land taken for telegraph, macadamized, graded, plank or railroad purposes, so far as applicable thereto, and, when so condemned the said land and any interest therein shall belong to such corporation or owner thereof; third, to hold and acquire, by purchase or condemnation, any such real estate as may be requisite or necessary for the purpose of constructing, erecting, maintaining and operating terminal facilities for the use of the railroads occupying or having access to such union station or depot, and also to build, maintain and operate terminal railroads and terminal facilities to be used in connection with such union station or depot, and to build, maintain and operate railroads, ferries and bridges over navigable streams, or otherwise, and to construct tunnels as and for approaches to said union station or depot, and to such extent as may be deemed necessary by the corporation operating and maintaining such union station or depot, and for such purposes to acquire property and extend its terminal

facilities beyond the limits of this state, and also to transport, or permit to be transported, persons and property over such railroads, ferries and bridges as may be built or operated by any corporation operating thereunder, and to charge compensation therefor, and such depot or railroad company may acquire and hold the stock and obligations of any company operated in connection with or forming part of the terminal facilities of such union depot or railroad company, and may guarantee the principal and interests of such obligations and dividends upon such stock; fourth, to have the right to lay the necessary tracks across, over, upon or under such streets of the city in which said station or depot is to be constructed, and across, over, upon or under such roads of the county or counties into which such terminal facilities are to be extended, as may be necessary in order to make the necessary connections with all such railroads as are to have access to said station or depot, and also to construct such station or depot across, under, over or upon any such streets or roads: *Provided,* that nothing herein contained shall be construed to authorize the construction of such tracks, or station or depot, not already located, across, under, over or upon any street in a city or a road of any county, without, the consent of the corporate authorities of such city or the county court of such county; fifth, from time to time, to borrow such sums of money as may be necessary for the construction, completion, equipment, maintenance, finishing, operating or repairing of such station or depot, and the terminal facilities connected therewith, or for the purpose of funding its floating debt, or refunding its bonded debt, or for the purpose of making additions, alterations or betterments to its property, authorized by its charter, or for making any connection with any railroad which is to have access to such union station or depot, or with any bridge or tunnel connected with or forming a part of such terminal facilities or for the construction, alteration or repair of any such bridge or tunnel connected with or forming a part of such terminal facilities, and for any or all

of the above named purposes, may issue, sell, hypothecate and dispose of its corporate bonds for such amounts and at such prices as may by such corporation be deemed proper for obtaining any amount so borrowed, and may mortgage its corporate property and franchise or franchises, or any part or parts thereof, to secure the payment of such bonds or of any debt so contracted by such corporation for any of the purposes aforesaid; sixth, to open, from time to time, books of subscription to the remainder of the capital stock not taken by the subscribers to the articles of association: *Provided, however,* that any company organized under the preceding section shall not have the power by condemnation to acquire the property now owned by any other union depot company or railroad company and used or needed for its corporate purposes, but any company formed hereunder shall have the same right and power to intersect, connect with and cross other railroads with its tracks, and to join and unite its tracks with those of similar companies or railroad companies as is by the Constitution and laws of this state conferred upon railroad companies, and the same method of ascertaining the compensation to be made therefor shall apply as is provided in the case of railroad companies under similar circumstances.

Appendix "B"

In the published Laws of Missouri, 1879, p. 257, under the heading "Resolutions," there appears the following:

"JOINT AND CONCURRENT RESOLUTION in relation to the revision of the Statutes of the State of Missouri.

"WHEREAS, The constitution of the State of Missouri provides that within five years after its adoption, all the statute laws of a general nature, both civil and criminal, shall be revised, digested and promulgated; and

"WHEREAS, Said constitution became the supreme law of the land on the 30th day of November, 1875, and the five years expire on the 30th day of November, 1880; and

"WHEREAS, This is the only regular session which can be held by the terms of said constitution, before the expiration of said five years; and

"WHEREAS, There is no provision in the constitution and laws of this State, or the rules of the respective houses, as to the mode and manner in which revision shall be made; now, therefore, that this the 30th General Assembly may comply with the above provision of the constitution,

"*Be it resolved by House of Representatives of the State of Missouri, and the Senate concurring therein, as follows:*

"*First*—That a committee of seven, consisting of three members of the Senate and four members of the House, be selected as hereinafter provided, whose duty it shall be to proceed immediately to revise and digest all the statute laws of the State of a general nature, both civil and criminal, and as said committee shall complete the revision of each separate act or subject, contained in the present statutes, or session acts, or shall submit an act upon any new subject, the same shall be reported to either House for adoption and approval, or to be otherwise disposed of by the General Assembly."

Second—(Authorization for suitable rooms.)
Third—(Necessary equipment.)
Fourth—(Committee excused from attendance.)

"*Fifth*—When an act upon any subject shall have been reported and passed by both houses, and signed by the Governor or passed over his veto, no member in either House shall offer any bill or resolution on the same subject during the session of the Thirtieth General Assembly; except at the conclusion of the revision of all the laws and the adoption thereof, a bill or bills may be offered and acted upon, *declaratory of such revision*, and providing for carrying the same into effect and for the preparation of convenient indices, marginal notes, references to court decisions and publishing and distributing the same.

"*Sixth*—Whenever the chairman of any committee of either the Senate or House, to whom have been referred any bill of a general nature, either civil or criminal, relating to the revision of the statutes, are ready to report on same by amendment, substitute or otherwise, and the said report is that the said 'bill as reported do pass,' the chairman shall report the same to his respective House, when it shall be subject to amendment, but before engrossment said bill shall be recommitted to the Committee of Revision as provided for in section one of this resolution, who shall proceed to consider the same as if it had originated with them, in the line of their prescribed duties under this resolution, and shall report the same back to the body in which it originated, together with their action upon the same, and said bill shall be further proceeded upon as provided by law for bills upon second reading.

"*Seventh*—Whenever the chairman of any committee of either House, to whom have been referred any bill, are ready to report upon the same, and said report is 'without recommendation,' or that said 'bill do not pass,' the chairman shall report the same to his respective House to be proceeded upon as required by law, and if it pass both Houses, it shall be recommended by the House in which it was last considered, to the Revision Committee, to be by them incorporated in the revised laws of the State; *Pro-*

vided, that all bills that have proceeded to engrossment in either House, shall be proceeded upon as required by law, and if passed by both Houses shall be recommitted by the House in which last considered to the Revision Committee, to be by them incorporated in the revised laws of the State; *and, further provided,* that the general appropriation bills and the bills relating to the assessing and collecting the revenue, and the bills relating to the various State institutions, shall not be referred to the Revision Committee until after they are passed by both Houses and are signed by the Governor.

"*Eighth*—Immediately after this resolution is passed and approved by the Governor, the Senate and House shall, before proceeding to any other business, proceed to the selection of the committee provided for in section one of this resolution, by an election in their respective houses.

"*Ninth*—That House Concurrent Resolution No. 14, be and the same is hereby rescinded and annulled.

"Approved March 4th, 1879."

Appendix "C"

The Revised Statutes of 1879 contained the following Preface:

"Under the provisions of section forty-one of article four of the Constitution, it became the duty of the Thirtieth General Assembly to 'revise, digest and promulgate all the statute laws of the state of a general nature, both civil and criminal.'

"In pursuance of this constitutional requisition, the General Assembly, at the regular session of 1879, adopted a joint and concurrent resolution providing for the election of a Joint Committee, to consist of three members of the Senate and four of the House, to revise and digest the laws of the State, and report the same to that body for approval.

"In compliance with the requirements of this resolution, Messrs. Hockaday, Wilson and Parrish were elected on the part of the Senate, and Messrs. Dryden, Anderson, McDaniel and McIntyre on the part of the House.

"In advance of the adoption of this resolution, the General Assembly, with a view of apportioning the labors incident to the work and securing its early completion, had already inaugurated a plan of revision, through the introduction of bills embracing every subject in the General Statutes of 1865.

"These bills had been referred to appropriate committees, and the work of revision had very considerably advanced before the Joint Committee had organized and entered upon its duties. The labor of the committees of the two Houses, therefore, constituted an important adjunct in the work of revision, and contributed much to aid the Revising Committee in completing its labors within the limits of the session.

"Under this system, all of the mort important subjects in the statutes and sessions acts were carefully revised and reported, and passed as other bills in the course of ordinary legislation. But as this mode of revision was necessarily tedious and expensive, by reason of the large amount of printing it imposed,

those acts which, in the judgment of the General Assembly, required no changes or amendments were left undisturbed.

"After a lengthy and laborious session, the work of revision having been completed as far as it was practicable to be done by legislation, the General Assembly, by an act, approved May 31st, 1879, continued the undersigned members of the original committee in session after its adjournment, to collate, annotate and otherwise prepare the work for publication.

"By the provisions of this act, it became the duty of the committee to prefix to each section of the volumes appropriate catch-words as a substitute for the marginal notes in former revisions. This has been done, it is believed, in a manner to fully meet the purpose of the law.

"To each section has also been added a reference, showing the date of the last enactment, the page and section if taken from the session acts, or the page and section if taken from the revision of 1865, or, if a new or amended section, it is so indicated, and wherever the words 'amended' and 'new section' occur in the references, they are to be understood as applying exclusively to revised bills.

"In further pursuance of this act, copious references have been made in the notes to the decisions of the Supreme Court. These embrace a reasonably full digest of the decisions construing the statutes to which they are appended, running from volume one to sixty-eight, both inclusive, with occasional references to the sixty-ninth.

"Prefixed to the first volume will also be found the Constitutions of the United States and of this State; the Declaration of Independence; the Articles of Confederation; Washington's Farewell Address; the Act of Congress admitting the State into the Union, and the Ordinance of the Convention in relation thereto.

"To the same volume are annexed the acts of Congress in relation to the election of United States Senators; fugitives from justice; naturalization, and the authentication of public records; and also the forms adapted to the laws of the State. The latter will be found sub-

stantially as they appear in the revisions of 1855 and 1865, with such alterations as changes in the laws demanded.

"In the appendix to the second volume, the laws specially applicable to the city of St. Louis have been collated.

"The arrangement of the work, whilst the new one in this State, will soon commend itself as the most convenient that could have been devised under the existing condition of our laws. The committee found a vast amount of miscellaneous matter running through the session acts and remaining unrepealed, which it became their duty to collate. To have given it its place under an alphabetical arrangement would have interspersed both volumes with a large amount of incongruous matter. To avoid this, all laws of most constant use in the courts and by the bar are alphabetically arranged in the first volume, and the miscellaneous matter, and that most subject to repeal and amendment by future legislatures, will be found under alphabetical arrangement in the second volume.

"The sections have been numbered consecutively through both volumes, and a full and accurate index is appended to each.

"In defiance of every precaution, some errors and omissions will necessarily be found in the volumes: but none, it is apprehended, that will materially affect the sense, or that the intelligent reader will not readily be able to correct and supply.

"Careful comparisons of the revised bills with the original rolls, and of the unrevised laws with the original acts, have been made, and all material errors in the enrollment have been noted at the foot of the page, and in other cases omitted, and explanatory words supplied in the text in brackets.

"Such changes as the committee were authorized to make under the provisions of the act of May 31st, 1879, have been limited to the cases prescribed in that act, but have not been noted, as it was thought that such reference would tend to encumber the book with a profusion of notes of no practical benefit to the reader.

"No effort has been spared to make the revision thorough and accurate, and, as far as possible, free from

errors. Wherever the latter occur materially affecting the sense, they are noted in the errata.

"The committee are largely indebted to their clerk, Charles A. Winslow, Esq., of the Jefferson City bar, for valuable services in every department of the work, and especially in the preparation of the index. They further acknowledge valuable aid from the offices of the Auditor and Superintendent of Public Schools in the collation and preparation of the school and revenue laws.

"The Secretary of State, Hon. M. K. McGrath, has likewise afforded the committee every facility in his power to promote the success and early completion of the work.

JOHN A. HOCKADAY, Chairman,
THOMAS H. PARRISH,
BENJAMIN F. MCDANIEL,
DANIEL H. MCINTYRE.

City of Jefferson, November 1st, 1879."

Appendix "D"

"Statutes: Revision and Publication of. An Act Declaratory of the Revised Statutes of the State of Missouri and their Effect and to Provide for the Collation, Editing and Printing, Binding, Publishing and distributing the same," Laws of Missouri, 1879, p. 210.

Section 7 thereof provides:

> "What acts not to be published in the Revised Statutes.—All acts relating to the bonded indebtedness of the state, all acts of incorporation, all acts for the appropriation of money, all memorials and joint resolutions, all acts and parts of acts of a private, local or temporary nature, or specially applicable to particular cities or counties, except as provided in the next preceding section, shall not be published in the Revised Statutes; but all such acts and provisions now in force or passed at the present session and not expressly repealed by or repugnant to the provisions of the Revised Statutes, shall continue in force or expire, according to their respective provisions or limitations, and all such acts, and all acts of a general nature having an emergency clause, passed at the present session, shall be published by the secretary of state as directed by law."

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1020

NORTH KANSAS CITY DEVELOPMENT COMPANY, NORTH KANSAS CITY BRIDGE AND RAILROAD COMPANY AND NORTH KANSAS CITY LAND AND IMPROVEMENT ASSOCIATION,
Petitioners,

against

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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SUBJECT INDEX.

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STATEMENT OF THE CASE.

Introduction.

Controverting and deeming insufficient petitioners' [1] statement, respondent [2] makes its own statement of the case.

Burlington instituted this condemnation suit to acquire a collection of 19 separate and isolated industrial lead tracks at North Kansas City, which tracks are con-

[1] Hereinafter called Development Co. or Bridge Co. The Improvement Assn. assigned no errors and prosecuted no appeal from the District Court's judgment (R. 240-252). Accordingly it has no standing to petition this court for certiorari.

[2] Hereinafter called Burlington.

nected with, and are accessible to, only the Burlington Railroad (Findings 17, 18, 20, Appendix v-vi).[3] Burlington has exclusively operated the condemned tracks, for more than a quarter of a century (Finding 21, App. vi). The tracks were constructed at various times between 1912 and 1937, *not for the purpose of complying with the Bridge Co.'s charter obligations* (Finding 31, App. ix), but in order to fulfill private real estate contractual obligations assumed by the Development Co. (Findings 13-15, App. iii-v).

The Development Co., having no railroad franchise (Findings 2, 22, App. i, vi; R. 1825), arranged with Burlington to operate the lead tracks and serve the industries located thereon (R. 292-294; Findings 15, 16, 17, 32, App. iv, v, ix; R. 1490-1491, 1845). Accordingly, in March, 1913, Burlington published and filed with the Interstate Commerce Commission switching tariffs governing its movements to and from these North Kansas City industries (Finding 21, App. vi). Burlington thereby assumed the obligations and acquired the rights of a railroad common carrier in the district (R. 464). The North Kansas City shippers thereby became, and presently are, Burlington's transportation customers (R. 1845-1847).

Prior to 1921, Burlington paid no compensation for the privilege of operating such lead tracks as had been constructed up to that time[4] (R. 326; R. 1490-1491). On May 17, 1921, *the Development Co. proposed that Bur-*

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[3] The District Court's memorandum opinion, Findings of Fact and Conclusions of Law appear at R. 116-127. For this Court's convenience, we have printed the Findings, together with supporting record references, in the appendix of this brief (App. i-ix).

[4] Between 1912 and 1921, 4.67 miles of lead track had been constructed. Ex. 1 (R. 263) shows the date when each segment of lead track was constructed, and one inch on the map equals 200 feet on the ground.

lington enter into a lease whereby Burlington would operate all the lead tracks then and thereafter to be constructed and *pay the Development Co.* $1 for each loaded car moved into or out of the industrial district—*the Development Co. to maintain the lead tracks* in good operating condition (Finding 32, App. ix; Def. Ex. 11, R. 1007-1009; R. 1490-1491). Burlington accepted the Development Co.'s written proposal.

Because the Development Co. followed the practice of carrying title to the Development Co.'s railroad tracks in the name "Union Depot, Bridge and Terminal Railroad Company," Burlington did, at the special request of the Development Co., make all checks payable in the name of the Bridge Co. (Def. Ex. 9, R. 659 at 792). The initial bill for the use of the tracks under the lease of May 17, 1921 carried the notation "Bill 4183-B for trackage, placing of switch cars at industries, North Kans. Cy., *North Kansas City Development Co. tracks being used*" (Def. Ex. 9, R. 659 at 790).

If the lease of May 17, 1921 had been executed by the Bridge Co., it would have been necessary to secure Missouri Public Service Commission approval—otherwise the lease would be void.[5] However, the lease being made by the Development Co., no Public Service

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[5] No railroad corporation * * * or common carrier shall hereinafter * * * lease * * * the whole or any part of its railroad * * * necessary or useful in the performance of its duties to the public * * * without having first secured from the commission an order authorizing it so to do. Every such * * * lease * * * made other than in accordance with the order of the commission authorizing the same shall be void. * * * Nothing in this subsection contained shall be construed to prevent the * * * lease * * * of property which is not necessary or useful in the performance of its duties to the public, and any lease of its property by such corporation * * * shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public. * * * (1939 Mo. R.S., Sec. 5632.)

Commission approval was obtained (Findings 30, 32, App. viii, ix; R. 297).

Neither the Development Co. nor the Bridge Co. ever had charter power to construct, own, or operate the condemned lead tracks (Findings 2, 31, App. i, ix). *Neither the Development Co. nor the Bridge Co. ever held itself out to the public as a railroad common carrier* (Finding 22, App. vi; R. 297, 417). *Neither the Development Co. nor the Bridge Co. ever, in fact, devoted the condemned property to public use* (Finding 22, App. vi; R. 296-297, 417, 462).

On the basis of the foregoing facts, the District Court concluded, as a matter of both state and federal [6] law, that the condemned industrial lead tracks had long since become a part of the Burlington railroad system (Conclusion (m), R. 126; *Alton R. Co.* v. *Illinois Commerce Commission,* 305 U. S. 548, 553-555; *Missouri Southern R. Co.* v. *Public Service Commission,* 279 Mo. 484, 214 S. W. 379), and that Burlington was under a legal duty permanently to continue their operation (*State ex rel, Public Service Commission* v. *Missouri Southern R. Co.,* 279 Mo. 455, 214 S. W. 381; Conclusion (m), R. 126; *Alton R. Co.* v. *Illinois Commerce Commission,* 305 U. S. 548, 553-555; *Missouri Southern R. Co.* v. *Public Service Commission,* 279 Mo. 484, 214 S. W. 379).

The Pleadings.

Burlington's petition described 19 separate parcels of right-of-way, comprising 18.86 acres, and named the Development Co. as the record owner of 17.25 acres (R. 8-29), the Improvement Assn., as the record owner of 1.04 acres (R. 14-15), Messrs. Curran and Fratt as record owners of undivided interests in .26 of an acre

[6] The greater per cent of the cars switched over these tracks are moving in interstate commerce (R. 731, 713, 429).

owner of .30 of an acre (R. 10). See Findings 26-27 (R. 14-15)[7] and the so-called "Bridge Co." as the record (App. vii) and Findings after Verdict (R. 155-157).

The corporate defendants, whose policies were dictated and controlled by Armour and Swift from 1903 to 1929 (Def. Ex. 9, R. 659 at 788) and by the Van Swerin-gens and their New York bankers from 1929 to date[8] denied Burlington's power and right to condemn (R. 36 at 38; R. 38 at 39). These railroad-banking interests caused an answer to be filed for the Development Co.

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[7] We disagree with petitioners' statement to the effect that Curran, Fratt, and the Improvement Assn. are in the same position as the Development Co. (Brief 10), because the evidence showed, and the Court found, that the Development Co. built and owned all the tracks (Findings 14, 27, App. iv, vii), because Curran and the Fratts did not deny Burlington's power to condemn (R. 34-35) and because neither the Improvement Assn., nor Curran nor Fratt assigned errors or filed briefs in the Court of Appeals. Accordingly, the District Court's Findings, Conclusions, and Judgment were final as to these defendants.

[8] See Bridge Co.'s Return to I. C. C. Questionnaire, filed several years after Burlington's condemnation suit (R. 1296 at 1301-1307), where counsel consume seven pages of the record soliloquizing as to whether the "Bridge Co." is controlled by Terminal Shares, Marine Midland Trust Co., Guaranty Trust Co., Douglas & Co., Alleghany Corporation, or Missouri Pacific Railroad. Without so much as disclosing to the Interstate Commerce Commission the facts set forth in Burlington's condemnation petition concerning the termination of the Bridge Co.'s corporate charter, counsel advised the Interstate Commerce Commission, as required by statute, that they were "of the opinion that the proposed construction, as set forth in the application of the North Kansas City Bridge and Railroad Co., * * * is within the charter powers of the North Kansas City Bridge and Railroad Co." (R. 1340.) For filing this application, counsel charged a modest $17,295 (R. 1525). Dead or alive, this hopelessly insolvent Bridge Co. (R. 1535, 1531) has had a passion for bookkeeping and litigation, although it has never owned a box car or a locomotive and never hired an engineer or a fireman (R. 296), never constructed a foot of its 25-mile railroad (R. 290-292, 296, 283; Def. Ex. 9, R. 659 at 747-751, 757; Def. Ex. 19, R. 1022 at 1029), and never turned a hand toward the construction of its depot (R. 296).

wherein it was alleged that company "had no right, title, or interest in any of the lands sought to be condemned by plaintiff" (R. 37), despite the fact that the Development Co.'s vice president and general manager advised the attorneys that the land was owned by the Development Co. (R. 1663-1667), that the land stood of record in its name and no conveyance had ever been made by it (R. 1667, 293-294; Findings 26-27, App. vii).

These railroad-banker interests also caused the Bridge Co. to file an answer alleging that it was incorporated under Art. 2, Ch. 12, R.S., 1899, "for the purpose of constructing and operating a *railroad for public use*" (R. 443); that the Development Co. at one time owned nearly all the land described in Burlington's petition; that the Development Co. was and still is a real estate development company; that the Development Co. "entered into a plan and program to develop said real estate as an industrial district and to sell industrial and factory sites therein; that the Development Co. entered into contracts by which, in order to induce prospective purchasers to purchase industrial and factory sites in said industrial district, they agreed with such prospective purchasers to cause to be constructed lead tracks and through switching tracks connecting with private industry tracks of said industries * * * for the purpose of switching cars to and from said industries"; that "by reason of the fact that said Development Co. * * * did not have charter power to construct, maintain, or operate a railroad or railroad properties," said Development Co. *"induced this defendant to construct such railroad tracks and railroad right-of-ways as would fulfill the contracts so made by said Development Co.* * * *" (R. 45) "* * * and since such construction of said tracks and right-of-ways, this defendant has continuously owned, operated, and used said tracks and right-of-ways for *railroad purposes* as a common carrier of freight and passengers * * *" (R. 46);

that "in manner and form aforesaid, this defendant has caused its *railroad properties* described in plaintiff's petition to be continuously operated as *railroad properties,* and in the manner and form aforesaid, this defendant has operated as a *railroad corporation* and has caused its said *railroad properties* to be continuously devoted to a public use, and the same now are devoted to public use as *railroad properties*" (R. 49) "during all of which time *it has been chartered as a railroad corporation,* and during all of which time *it has claimed the right to own and operate the said properties as railroad properties* * * * and therefore the plaintiff has no right to deny or question the power or authority of this defendant to own or operate said properties as *railroad properties* or to deny or question this defendant's authority to devote said properties to a public use as *railroad properties*" (R. 50, 51—Italics ours).

In the District Court, defendants did not contend, as they now claim, "that the Bridge Co. was, in fact, a Union Depot Co. * * * and that the self-executing forfeiture provisions * * * did not apply to a Union Depot Co." (Pet. p. 4). As indicated by the Court of Appeals' opinion, "this argument would seem to constitute a departure from the theory of the pleadings and of the trial before the District Court" (R. 2023). For Bridge Co.'s trial theory, see also: Curran, R. 435; Def. Ex. 21, R. 1051 at 1055 and 1110-1112; Def. Ex. 4a, R. 839 at 855. When the case was submitted February 23, 1940, the Bridge Co., by its requests 19 and 22, asked the District Court to find that it had been formed under Art. 2, Ch. 12, R.S., 1899 as *a railroad corporation* (R. 93, 99). Not once in 27 pages of requested findings (R. 85-115), did the Bridge Co. mention incorporation or existence as a Union Depot Co. This contention was first advanced in additional requests, filed April 24, 1940, *two months after the case was submitted* (R. 88), *and one month*

after the Court had found the facts, declared the law and indicated its judgment (R. 116-127). The Bridge Co.'s pleadings and trial theory are accurately stated by the District Court in its memorandum opinion of March 30, 1940, as follows:

> "There would be no question that the plaintiff has the legal right to condemn the railroad property involved for railroad purposes were it not for the contention of one of the defendants (North Kansas City Bridge and Railroad Co.) that it too is a *railroad corporation* and that it owns and is operating and has owned and continuously has operated a railroad upon the properties * * *."

Erroneous Statements in Petition for the Writ.

Defendants incorrectly state "that the reason for the institution of this condemnation suit was that defendants desire to build a crossing over the tracks of the Burlington so as to connect the tracks here sought to be condemned with the tracks of the Bridge Company which operated on the bridge over the Missouri River * * * and that Burlington feared that its monopoly in the transportation of traffic out and into the North Kansas City district would be ended and that the shippers in that district would have the choice of carriers" (Pet. 6-7). Whether or not it is necessary that Burlington acquire the property by condemnation or continue to lease it from the Development Co., relying upon the latter to maintain the tracks under the lease (R. 1007), does not present a judicial question. Under Missouri law, Burlington's choice between these alternatives is not reviewable in the courts (*Southern Illinois & Mo. Bridge Co.* v. *Stone,* 174 Mo. 1, 73 S. W. 453; *City of St. Louis* v. *Senter Commission Co.,* 336 Mo. 1209, 84 S. W. 2d 133). But if reasons were necessary, *the admittedly deplorable condition in which the Development Co. has maintained the tracks*

(R. 1440-1443, 1898-1899, 1901-1902, 1899), since the Van Sweringens and their New York bankers acquired control, would furnish adequate grounds.

Moreover, before any crossing of the Wabash and Burlington main line rights-of-way could be constructed so as to connect the bridge with the condemned tracks, and thereby enable some other railroad to invade Burlington's exclusive industrial territory, the Interstate Commerce Commission would first have to determine whether public convenience and necessity require the construction of such a crossing. (49 U. S. C. secs. 18-21; *Texas & Pacific Ry. Co.* v. *Gulf C. & S. F. Ry. Co.*, 270 U. S. 266.) Nearly a year after Burlington's second condemnation petition was filed, the Bridge Co. filed an application with the I. C. C. for a certificate to construct such an overhead crossing (Pl. Ex. 23, R. 1295-1341). The proposed overhead crossing is 5,200 feet long and requires the construction of 8,000 additional feet of track (R. 1335-1336). Maps showing the overhead viaduct and the auxiliary trackage are shown at R. 1330-1334. Other evidence shows that the cost of this project would be from $400,000 to $676,000 (Def. Ex. 19, R. 1022 at 1041). Since *the condemned tracks cannot be simultaneously served by more than one railroad* (R. 1346, 462-463) and since the purpose of the overhead crossing and auxiliary track is to eliminate the Burlington and substitute the Missouri Pacific as the switching carrier (R. 662, 1342; Def. Ex. 19, R. 1022 at 1037-1038, 1042), neither the shipping public *nor the hopelessly insolvent Bridge Co.* (R. 471-2) has anything to gain by this wasteful and improvident expenditure of money (R. 712, 462-463; Def. Ex. 19, R. 1022 at 1030-1031, 1042, 1043). Indeed, the Missouri Supreme Court has wisely observed that "useless construction tends to increase the burden of the public in transportation charges" (*C., B. & Q. R. Co.*

v. *McCooey,* 273 Mo. 29, 200 S. W. 59, 63). Justice Brandeis made the same observation in *Texas & Pacific Ry. Co.* v. *Gulf C. & S. Ry. Co.,* 270 U. S. 266, 277, when he said:

> "* * * Congress * * * recognized that * * * the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. * * *"

Nor does the I. C. C. grant certificates for the purpose of enabling one railroad to invade the exclusive industrial territory of another, where, as in this case, the present Burlington railroad service is adequate (R. 1853, 467; Def. Ex. 19, R. 1022 at 1030-1034, 1042, 1043); *Toledo, Peoria & Western Railroad Operations & Construction,* 162 I. C. C. 100; *Piedmont & Northern Ry. Construction,* 138 I. C. C. 363, 400-402). Contrary to the statement made in defendant's petition (pp. 6-7), this overhead crossing project would not give the North Kansas City shippers any more access to main-line railroad carriers than is presently afforded by Burlington via its Murray Yards (Def. Ex. 9, R. 712; Def. Ex. 19, R. 1022 at 1026-1027, 1030; R. 462, 463).

Bearing in mind that the Bridge Co. (dead or alive) has been hopelessly insolvent for more than twenty years (R. 471-472, 1339), that its liabilities presently exceed its assets by more than $5,000,000 (R. 1530-1535) and that it has had no bank account since 1903 (Def. Ex. 9, R. 659 at 754), it is interesting to note the response made by the Bridge Co. to Q. 28 of its "Return to I. C. C. Questionnaire" when asked *how the overhead crossing project was to be financed.* In response to this I. C. C. question, the Bridge Co. answered (Pl. Ex. 23, R. 1295, 1319):

> "There are several methods available to applicant to finance the proposed construction and purchase of equipment, *all of which are being studied by the applicant.*" (Sounds like Amos 'n Andy!) The Bridge Co. says the project "had been planned ever since the first lead track was built" (Pet. 13) in 1912 *—30 years is a long time to study a financial plan without reaching any conclusion!*

The so-called overhead crossing project is simply a device of the Van Sweringens and their bankers whereby they seek to recoup from either Burlington or the Missouri Pacific the improvident expenditures which they made for these properties (Per Faris, *In re Mo. Pac. R. Co.,* 13 F. Supp. 888, all the facts of which are incorporated in this record (R. 1305).

Van Sweringens' Murphy testified $13,000,000 was paid for the Packers' two-thirds stock interest in the North Kansas City companies (R. 660-662). On motion of the R. F. C., the late Judge Faris refused to permit the Van Sweringens to unload these properties on the Missouri Pacific at that price, because $13,000,000 represented a fraudulent and grossly excessive consideration (13 F. Supp. 888, 890). Judge Faris did not know, what the United States Senate later discovered, that the Van Sweringens also received, as a part of the consideration for this lavish expenditure, a side agreement whereby the Packers promised to divert to the Van Sweringen railroads 35 per cent of the Packers' eastbound Kansas City shipments. Immediately after the transaction between the Packers and the Van Sweringens in October, 1929, the Packers' shipments over the Rock Island, the Santa Fe and Burlington declined, month after month, and, on the other hand, the Packers' shipments over the Missouri Pacific and the C. & E. I. (both Van Sweringen controlled) increased, month after month.[9] The Packers

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[9] [*Subcommittee of Interstate Commerce Committee* (Wheeler Committee) Report submitted pursuant to Senate

had no more right to sell to the Van Sweringens the Burlington's North Kansas City transportation business than had the proverbial urbanite to sell the post office, the court house, or the city hall to his country brother.

We submit the foregoing throws into bold relief the real truth about the "Bridge Co.'s" defense of this litigation, as well as the interests of the Van Sweringens and their New York bankers. It also shows the hopelessly insolvent Bridge Co. and the North Kansas City shippers have nothing to gain by the "overhead crossing"! In addition to furnishing an answer to the erroneous statement quoted from pages 6-7 of the peti-

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Resolution 71 (74th Congress). Volume 24: letter from General Agent Rush of the C&EI to Martin E. Paddon, Agent, U. S. Senate Committee on interstate commerce, stating that as a result of the purchase of two-thirds control of the North Kansas City industrial district, agreement was made whereby the Van Sweringen lines (Mo. Pac., C&EI, etc.) were to be allotted 35% of the Armour and Co. traffic from their Kansas City plant moving to eastern points (Ex. 3858 at p. 10831 of Vol. 24); letter from C&EI General Agent Rush to C&EI General Freight Agent Stevens to same effect (Ex. 3860, p. 10832 of Vol. 24); letter from C&EI General Freight Agent Stevens to C&EI Vice President in Charge of Traffic Ford, stating "I understand control of this business to Missouri Pacific is the result of investment of Van Sweringen interests in the North Kansas City industrial district, having purchased two-thirds control" (Ex. 3861, pp. 10832-10833 of Vol. 24); Ex. 3853 at p. 10821 of Vol. 24 shows Missouri Pacific traffic from Swift and Co. out of Kansas City increased from 19.56% in 1925 to 33.29% in 1936. Ex. 3855-B at p. 10827 of Vol. 24 shows the loadings routed by Swift and Co. from St. Joseph to Chicago, St. Louis, and Kansas City via Missouri Pacific as compared with that routed via Rock Island, Santa Fe, and Burlington, and it shows that *while Missouri Pacific received 14.10% of this business in 1928 (when the deal was made) it received 32.44% in 1930 and, for 11 months of 1936, it handled 55.92% of the business!* Exs. 3858-3882, pp. 10831-10842 of Vol. 24, are letters from various railroad traffic officials with reference to the alleged agreement of Armour and Swift to route 35% of their Kansas City eastbound traffic via Missouri Pacific and C&EI. The foregoing report of the U. S. Senate Committee is a public document and has been incorporated in this record by reference (R. 1305).]

tion, the foregoing also answers the erroneous claims set forth in the petition at pages 13-16.

Throughout their petition and brief, counsel stress the fact that the Bridge Co. has maintained the condemned tracks since 1912 (pp. 5, 11, 12). As a matter of fact, the Bridge Co. has had no bank account since 1903 (Def. Ex. 9, R. 659 at 754), and the books kept in its name by the Development Co. show a hopeless insolvency extending over 20 years (R. 471-472). The District Court found the Development Co. constructed and owns the tracks (Findings 14 and 27, App. iv, vii). By the express terms of the lease, the Development Co. was to "maintain all of said tracks at its own expense in good and safe operating condition" (Finding 30, App. viii; Def. Ex. 11, R. 1007).

On pages 5-6 of their petition, petitioners state they contended in the District Court that Burlington was estopped to show that the Bridge Co. was dead or that it was exceeding its corporate powers, etc. These claims were made in their pleadings, but, on the trial, they conceded that "the question of estoppel is involved *but not an estoppel directly against this railroad company—not an estoppel on account of anything this railroad company did*" (R. 661).

Findings, Conclusions and Judgment of April 24, 1940.

The issue concerning Burlington's right to condemn was submitted to the Court on voluminous evidence (R. 253-1348). After hearing argument and examining briefs, the Court made detailed Findings of Fact (App. i-ix), entered Conclusions of Law thereon (R. 124-126) and adjudged, April 24, 1940, that Burlington had the right and power to condemn (R. 130-131), and the Circuit Court of Appeals affirmed, but indicated the

District Court's judgment might have been based on narrower ground (R. 2014-2027; *Chicago, Burlington & Quincy R. Co.* v. *North Kansas City Development Co.*, 134 F. 2d 142-152). Among other things, the District Court concluded the so-called Bridge Co.'s corporate existence and franchise powers ceased on or before May 10, 1911 (Conclusion (i),[10] R. 125), prior to the construction of any of the tracks and rights-of-way sought to be condemned (R. 287-289; Ex. 1, R. 263; Findings 14-15, App. iv-v), because

> (a) it failed to begin construction of its chartered route within 2 years of its incorporation on May 10, 1901 (Finding 5, App. i-ii);
>
> (b) it failed to invest 10 per cent of its capital within 3 years of May 10, 1901 (Finding 6, App. ii);
>
> (c) it failed to finish and put in operation within 10 years from the time of filing its Articles of Association, any of the railroads or facilities described in its charter (Finding 7,[10] App. ii)—all as required by section 1161, Mo. Rev. St. 1899, being section 5248 Mo. Rev. St. 1939 (*Ford* v. *Short Line Railroad Co.*, 52 Mo. App. 429; *Collins* v. *Martin*, (Mo. Sup.) 248 S. W. 941; *Kansas City Interurban Railway* v. *Davis*, 197 Mo. 668, 95 S. W. 881).

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[10] The District Court's finding that the Bridge Co. "failed to finish and put in operation, within 10 years from the time of filing its Articles of Association, any of the railroads or facilities described therein," was not only supported by substantial evidence—it was not contradicted. Moreover, the opinion of the Circuit Court of Appeals clearly indicates that it also concurred in the District Court's Finding 7, inasmuch as the opinion states that the Bridge Co.'s railroad and depot were never built (R. 2017-2022) and that the bridge was first operated for pedestrians in 1912 (R. 2021) and was never operated by the Bridge Co. for railroad purposes at all (R. 2021). Accordingly, the District Court's Conclusion (i) (R. 125) necessarily follows, regardless of whether or not the Bridge Co. purchased some piers that had been built by a predecessor corporation before the Bridge Co. was organized on May 10, 1901 (R. 760; note 3 of the Court of Appeals opinion, R. 2020).

Throughout their petition and brief counsel repeatedly ignore the fact that the District Court also found that the condemned tracks and rights-of-way were not included in the Bridge Co.'s charter (Finding 31, App. ix); that the condemned tracks did not connect with any tracks included in the Bridge Co.'s charter (Finding 31, App. ix); that the condemned property constituted a collection of isolated industrial lead tracks which are not now, never have been, and cannot be, operated as a unit (Finding 20, App. vi); that they were built by the Development Co. in order to induce sales of industrial real estate (Finding 13, App. iii-iv); that said industrial tracks are connected only with the tracks of the Burlington (Findings 17, 20, App. v, vi); that Burlington had continuously and exclusively operated the condemned tracks and served the public, under published tariffs, pursuant to a lease from the Development Co. (Findings 16, 17, 21, 23, 32, App. v, vi-vii, ix); and that neither the Development Co., the Improvement Assn., nor the Bridge Co. had ever devoted the condemned property to public use (Findings 22, 30, App. vi, ix). The Court further found that, as to the subject matter of this eminent domain proceeding, Burlington had never misled any of the defendants (Finding 34, App. ix). Moreover, the Court concluded, as a matter of law, that estoppel could never be invoked to prevent an otherwise lawful exercise of the power of eminent domain (Conclusion (n), R. 126; *C. B. & Q. R. Co.* v. *McCooey,* 273 Mo. 29, 200 S. W. 59, 64-65; *City of Moberly* v. *Hogan,* 317 Mo. 1225, 1230, 298 S. W. 237, 239).

The Court of Appeals' opinion did not disapprove any of the District Court's findings and, as they are all supported by substantial evidence, they will be accepted by this Court as unassailable (*Alabama Power Company* v. *Ickes,* 302 U. S. 464, 477; *General Talking Pictures Company* v. *Western Electric Company,* 304 U. S. 175, 178;

Adamson v. *Gilliland,* 242 U. S. 350, 352-353; *Davis* v. *Schwartz,* 155 U. S. 631, 636-637). As the District Court and the Circuit Court of Appeals both adjudged that Burlington had the power and right to condemn, it would seem to be immaterial that the Circuit Court of Appeals elected to base its judgment on slightly narrower ground so as to avoid deciding that the Bridge Co.'s corporate existence had ceased on or before May 10, 1911 (Cf. *Helvering* v. *Gowran,* 302 U. S. 238, 245 and note 5 on p. 3, *supra.*)

Burlington's Motion to Dismiss "Bridge Co.'s" Appeal.

Contrary to the theory of ownership sought to be developed in the corporate defendants' pleadings, the District Court found the so-called Bridge Co. neither possessed nor owned any of the property sought to be condemned (Findings 26-27, App. vii). Indeed, counsel for the corporate defendants admitted the District Court's Findings, Conclusions, and Judgment of April 24, 1940 (R. 118-124, 124-126, 130-132) excluded the Bridge Co. from any ownership in the condemned property (R. 1663-1667 at 1666). *More important, the judgment of April 24, 1940 terminated the Bridge Co.'s corporate existence,* and it could not thereafter participate in the litigation except by way of appeal. Moreover, the District Court's Findings, Conclusions and Judgment were the law of the case in that Court (*Mortgage Loan Co.* v. *Livingston,* 66 F. 2d, 636, 640; *Boyle* v. *Chicago, Rock Island & Pacific Ry. Co.,* 42 F. 2d 633, 634-635). Having prosecuted no appeal within three months of the April 24, 1940 judgment, Burlington respectfully submits that the Circuit Court of Appeals had no jurisdiction to entertain an appeal by the Bridge Co. on December 22, 1941 (R. 183-184). Where a judgment terminates all rights of a party to the litigation (and it would be difficult to imagine anything more final than

a judgment terminating one's legal existence), the party must appeal from the judgment within three months or not at all (28 U. S. C. A. Sec. 230; *Hill* v. *Chicago & E. R. Co.*, 140 U. S. 52; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411; *Reeves* v. *Beardall*, 316 U. S. 283; *Thompson* v. *Murphy*, 93 F. 2d 38; *3 Moore's Federal Practice*, Supp. p. 93; 49 Yale Law Journal 146). Having no corporate existence and owning none of the property, the so-called Bridge Co. was not concerned with the jury trial of September, 1941 fixing the damages (R. 150-151), or with the judgment of October 28, 1941 apportioning the $835,000 award among Fratt, the Improvement Assn. and the Development Co.—Curran having waived his portion in favor of the Development Co. (R. 156, 177-178).

On February 10, 1942, the Bridge Co. filed separate assignments of error (R. 244-252). These attacked only the findings and conclusions of March 30, 1940, and the resultant judgment of April 24, 1940. Of necessity, the Bridge Co.'s claims of error must be based on the 1940 judgment, and any appeal by it must have been limited thereto, because that was exclusively the judgment which put the Bridge Co. entirely out of the litigation.

The Court of Appeals apparently denied Burlington's motion to dismiss the Bridge Co.'s appeal because it felt that neither the trial court nor the Burlington had acted on the theory that the judgment of April 24, 1940 was final as to the Bridge Co. (R. 2027). However, congress has provided that an appeal from a final judgment must be taken within three months (28. U. S. C. A., Sec. 230). This period cannot be extended by calling the judgment "interlocutory" (*Potter* v. *Beal*, 50 Fed. 860; *The Attualita*, 238 Fed. 909). No subsequent action of the District Court could extend the period (*Old Nick Williams* v. *United States*, 215 U. S. 541; *Shore* v. *United States*, 50 F. 2d 669;

Collins v. *United States,* 24 F. 2d 823; *Sprague* v. *C., B. & Q. R. Co.,* 17 F. 2d 768), nor could the three-month period be extended by stipulations, waivers, or other acts of the parties (*Shore* v. *United States,* 50 F. 2d 669; *Robie* v. *Hart-Shaffner & Marx,* 40 F. 2d 871). Because a fundamental question of jurisdiction over the subject matter is involved, Burlington renews its motion to dismiss the Bridge Co.'s appeal on the ground that it was not prosecuted within three months of April 24, 1940.

REASONS RELIED UPON BY PETITIONERS FOR ISSUANCE OF THE WRIT OF CERTIORARI.

While petitioners' application for the writ presents a curious mixture of reasons and argument, together with citations of, and quotations from, legal authority (Pet. 15-28), they appear to be urging five points which we will answer in the order set forth in the petition.

I. Federal Courts Have Jurisdiction of Condemnation Proceedings.

After having enjoyed two trials of the power-to-condemn issue in the District Court [11] and another in the Circuit Court of Appeals (R. 2013-2035), counsel now first suggest that the federal courts have never had jurisdiction of this cause. In support of their contention they cite a minority opinion written by Justice Holmes 40 years ago, *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239 (Pet. 16). They were careful

[11] Def. Ex. 9 (R. 659-960) contains the evidence offered at the first trial which terminated in the judgment of dismissal on November 7, 1938 (R. 1287-1291). The proceedings on the second trial will be found at R. 1-1348.

to avoid reference to the opinion, *subsequently written by Justice Holmes for a unanimous court,* holding the federal courts do have jurisdiction (*Mason City & Ft. D. R. Co.* v. *Boynton,* 204 U. S. 570), wherein the majority view in the *Madisonville* case was approved at page 578. Counsel likewise failed to mention *New York* v. *Sage,* 239 U. S. 57, wherein Justice Holmes again wrote the opinion of a unanimous court in a case involving federal jurisdiction of a condemnation suit brought by New York state.

In any event, congress has provided that "the District Court shall have original jurisdiction * * * of all suits of a civil nature at common law * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * is between citizens of different states" (Sec. 24 of the Judicial Code, 28 U. S. C. A. 41 (1)). "A judicial proceeding to take land by eminent domain and ascertain compensation therefor is a suit at common law within the meaning of the federal Judiciary Act (*Metropolitan R. Co.* v. *District of Columbia,* 195 U. S. 322; *Chappell* v. *United States,* 160 U. S. 499; *Kohl* v. *United States,* 91 U. S. 367); and when the requisite diversity of citizenship exists, such a suit may be brought in, or transferred to, the federal district court of the district in which the land lies (*Mason City & Ft. D. R. Co.* v. *Boynton,* 204 U. S. 570; *Searl* v. *School District,* 124 U. S. 197; *Clinton* v. *Missouri Pacific R. Co.,* 122 U. S. 469; *Mississippi & R. River Boom Co.* v. *Patterson Co.,* 98 U. S. 403; *New York* v. *Sage,* 239 U. S. 57)" 18 Am. Jur., pages 957-958.

To the same effect see *Franzen, et al.* v. *Chicago, Milwaukee, St. P. Ry. Co.* (CCA 7) 278 F. 370, 371, where a list of United States Supreme Court decisions, sustaining the District Court's jurisdiction herein, are cited.

Numerous additional Circuit Court of Appeals citations will be found in 28 U. S. C. A., Sec. 41 (1), Note 33, and 28 U. S. C. A., Sec. 71, Note 123. Inasmuch as the action taken by the United States District Court and the United States Circuit Court of Appeals conformed to the authority granted by congress, as construed by this Court in an unbroken line of decisions extending over 75 years, we think petitioners could not have seriously urged their first point. We cannot escape the notion that petitioners welcomed the trial of this case in the federal courts as long as they entertained the hope of a favorable decision. Having been disappointed, after six years of litigation, they would like to begin anew in the state courts. We respectfully submit their Point I is without merit.

II. Doctrine of Forum Non Conveniens Did Not Require That Federal Courts Refuse Jurisdiction.

As in the case with their Point I, petitioners did not urge this doctrine until they had been accorded two trials in the District Court and one in the Circuit Court of Appeals (Pet. 21). As a ground for urging its application, petitioners incorrectly state that

> "One of the determinative questions in the case is as to the construction of Sec. 1512 R. S. Mo. 1939 and specifically is whether any corporation, *de facto* or otherwise, which *for many years has devoted its property to the public service,* has been recognized as an existing corporation by the state, *has satisfactorily served the public and cannot abandon that service,* may nevertheless have its property condemned by another public service corporation which intends to devote the property to precisely the same public use." (Italics ours.)

The foregoing quotation furnishes an additional illustration of the way petitioners have repeatedly ignored

the findings of the District Court and the Circuit Court of Appeals. The District Court found the Bridge Co. had never devoted its property to public use (Finding 22, App. vi). The Circuit Court of Appeals concurred (R. 2019-2020, 2021, 2022). The evidence was uncontradicted that neither the Bridge Co. nor the Development Co. had ever held itself out to the public as a common carrier (Finding 20, App. viii; R. 297, 417; C. C. A. Op. R. 2022, 2015). The Bridge Co. had never owned a box car or a locomotive, never hired a fireman or an engineer, never published or filed a tariff, never turned a hand toward the construction of its depot (Findings 5, 6, 7, 30, 31, App. ii, viii, ix; C. C. A. Op. R. 2020-2021). Both the District Court and the Circuit Court of Appeals found that the condemned property consisted of an isolated collection of industrial lead tracks that had been constructed to fulfill the Development Co.'s private contractual obligations (Findings 13, 15, 20, App. iii-vi; C. C. A. Op. R. 2016, 2017, 2022, 2015), and that Burlington had alone devoted them to public use (Findings 16, 17, 20, 23, App. v, vi; C. C. A. Op. R. 2020).

As the condemned tracks do not constitute the railroad tracks covered by the Bridge Co.'s charter (Findings 5, 6, 7, 31, App. i, ii, ix; C. C. A. Op. R. 2020-2021), and since they do not connect with such tracks (Finding 31, App. ix; C. C. A. Op. R. 2020-2021), and as they cannot be operated as a unit, being only as an adjunct of the Burlington railroad (Finding 20, App. vi), it would not have been possible for the Bridge Co. to have lawfully devoted them to public use. Obviously, the Missouri Public Service Commission could not compel them to continue a service that had never been initiated (*State ex rel, Sheffield Steel Corp.* v. *Public Service Commission,* 325 Mo. 862, 878-879, 30 S. W. 2d 112, 116-117). The foregoing applies with equal force to any claim petitioners may be advancing in favor of the Development

Co. Contrary to the statements in the petition, the Missouri Supreme Court has already construed Sec. 1512, R. S. Mo. 1939, so as to permit condemnation of property owned by a public utility where the property is not necessary to carry out the charter obligations of the utility (*St. L., H. & K. C. Ry. Co.* v. *Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483). Moreover, the Missouri Supreme Court has also construed Sec. 1512, R. S. Mo. 1939 so as to permit condemnation where railroad property is owned by a business corporation, such as the Development Co. (*Kansas & Texas Coal Ry. Co.* v. *Northwestern Coal & Mining Co.* (1901) 161 Mo. 288, 320-321, 323, 61 S. W. 684, 691-692).

Again, petitioners incorrectly state the facts when they claim another novel question of Missouri law is presented, viz., "whether the doctrine that there can be no estoppel against condemnation * * * should be extended so as to preclude the defense here that there is an estoppel against urging that the corporate owner of the property already dedicated to the public use has forfeited its charter or is operating *ultra vires.*" (Pet. 23.) Of course, petitioners have carefully chosen their language so as to create the impression that they are presently devoting the property to public use. But *dedication* to public use is not the same as *devotion* to public use (*United States* v. *.8677 acre of land,* 42 F. S. 91, 98; *State ex rel.* v. *Public Service Commission,* 325 Mo. 862, 878-879, 30 S. W. 2d 112, 116-117). Moreover, the sole purpose of Burlington's petition is to acquire these 19 right-of-way strips and lead tracks for public use by condemnation and the sole purpose of petitioners in urging the doctrines of estoppel and *ultra vires* is to prevent the condemnation. Missouri law is clear that estoppel cannot be urged in bar of condemnation (*C., B. & Q.* v. *McCooey,* 273 Mo. 29, 200 S. W. 59, 64-65; *City of*

Moberly v. *Hogan,* 317 Mo. 1225, 298 S. W. 237; *cf.* Court of Appeals opinion, R. 2026).

The fact that Burlington sued the Bridge Co. as a corporation is immaterial under the Missouri forfeiture section (*Collins* v. *Martin,* Mo. Sup., 248 S. W. 941, 947; *Ford* v. *Kansas City & Independent Short Line R. R. Co.,* 52 Mo. App. 439; *cf.* Court of Appeals opinion (R. 2026-2027)). Petitioners' claim that *ultra vires* may be successfully urged as a defense is equally unavailing because the plain language of section 1512, Mo. R. S. makes previous lawful devotion to public use the primary inquiry on the issue of power to condemn. As the Court of Appeals observed "the question of collateral attack upon corporate powers or authority is not involved" (R. 2027).

We respectfully submit petitioners' Point II has no merit, because no novel questions of Missouri law are presented for solution by the District Court's Findings of Fact, which were approved by the Circuit Court of Appeals. Only by substituting erroneous facts have petitioners been able to assume false issues involving "novel questions of Missouri law"!

III. Burlington Not Estopped to Show Bridge Co. Dead, or Has No Railroad Powers, or Is Not Devoting Property to Public use.

Petitioners' Point III is a repetition of their Point II in another form (Pet. 18, 25-26). By carefully selecting their language, petitioners again seek to create the erroneous impression that the Bridge Co. is already devoting the property to public use and that Burlington seeks to appropriate it for an identical public use. On the basis of this erroneous assumption, they next contend that Missouri courts have never decided whether Burlington should be permitted, under such circumstances, to prevent their urging "waiver, acquiescence

or estoppel * * * to contend that the Bridge Co.'s charter was forfeited or its acts *ultra vires.*" They next state that the conclusion of the Circuit Court of Appeals "finds no support in existing authorities, is probably untenable and, therefore, is probably in conflict with the rule which the Missouri Supreme Court will announce when the question reaches that Court" (Pet. 25).

In the first place, and as previously pointed out, counsel waived their defense of estoppel, as against Burlington, by a judicial admission in the course of the trial (p. 13, *supra*). Moreover, and as previously pointed out, waiver, acquiescence or estoppel are inapplicable where the Missouri forfeiture section is involved. Suits have been instituted in Missouri against such defunct corporations, but such conduct did not operate as an estoppel to urge the forfeiture, it merely resulted in the Missouri Supreme Court sending the litigants back to get their pleadings in accurate shape (*Collins* v. *Martin* (Mo. Sup.), 248 S. W. 941, 947). Concerning defendants' privilege of urging *ultra vires,* section 1512 Mo. R. S. 1939 makes the question concerning the owning corporation's lawful devotion of the property to public use the primary issue on the trial of the right to condemn. As the Court of Appeals said, the previous lawful devotion to public use is, "under section 1512, Mo. R. S. A., always a matter for direct inquiry in a condemnation proceeding, and the question of collateral attack upon corporate powers or authorities is not involved" (R. 2027. *Cf. Kansas, Texas Coal Ry. Co.* v. *Northwestern Coal & Mining Co.,* 161 Mo. 288, 61 S. W. 684).

In any event, the function of the doctrines of estoppel and *ultra vires* is to prevent an inequitable result, viz., one party may not retain his portion of a bargain while refusing to accord the other party his *quid pro quo.* In this condemnation proceeding, such a doctrine might be

applicable if Burlington had already acquired the land and were refusing to pay just compensation on the ground the Bridge Co. had no legal existence or had acted beyond its powers. But no such situation obtains. As the District Court observed, this condemnation suit represents "a controversy * * * entirely new and distinct" (R. 118), wherein Burlington is ready and willing to pay just compensation for the property which it seeks to acquire.

It is also to be noted that, at all times, the Bridge Co. had as much knowledge concerning its failure to construct and operate the 25-mile railroad and depot called for by its charter as did Burlington. The Bridge Co. likewise had at least as much knowledge as Burlington that the first of the condemned tracks was constructed nearly 12 years after the date of the Bridge Co.'s incorporation. If Burlington is to be charged with knowledge of Missouri's forfeiture statute, the Bridge Co. is to be charged with equal knowledge. The Missouri Supreme Court has repeatedly held that where the means of knowledge is equal there can be no estoppel (*In re* Franz' Estate (Mo. Sup.), 344 Mo. 510, 127 S. W. 2d 401, 406; *Grafeman Dairy Co.* v. *Northwestern Bank,* 290 Mo. 311, 235 S. W. 435; *Roth* v. *Hoffman,* 234 Mo. App. 114, 111 S. W. 2d 988).

Finally, the purpose for which defendants seek to interpose the defenses of waiver, acquiescence or estoppel is to prevent Burlington's acquiring this property by condemnation. Missouri's Supreme Court has made it clear that neither waiver, acquiescence, contract or estoppel can be invoked for such purpose (*C., B. & Q. R. R. Co.* v. *McCooey,* 273 Mo. 29, 200 S. W. 59, 64-65; *City of Moberly* v. *Hogan,* 317 Mo. 1225, 1230, 298 S. W. 237, 239).

As the Circuit Court of Appeals concurred in the views expressed above (R. 2026), we respectfully urge

there are no novel Missouri questions presented herein and, accordingly, petitioners' Point III is without merit.

IV. Burlington's Condemnation Involves No Novel Construction of Sec. 1512, Mo. R. S. 1939.

In petitioners' Point IV, they have abandoned the attempt to create erroneous inferences by the use of carefully selected phrases, and boldly assert that if

> "the Bridge Co. cannot prevent the condemnation of its tracks and rights of way, * * * the result would be that the hundred and more industries of North Kansas City could be deprived of all existing railroad service simply because the Bridge Co., *although it has devoted its property to a public use for a quarter of a century,* * * * has either forfeited its corporate charter or has been acting *ultra vires.* Having in mind the fact that this service cannot be abandoned voluntarily, * * * it is inconceivable at the present time that this old statute of 1866 should be so construed that *the present use could be terminated at the instance of another public service corporation and the industries deprived of all transportation service.* An important question of construction not determined by the Missouri courts arises" (Pet. 27).

Such contention by a Bridge Co. that has had no bank account since 1903 (R. 759, 446-447), whose books show a mounting insolvency extending over 20 years (R. 472; Pl. Ex. 18, R. 470-471; Def. Ex. 9, R. 659 at 933-934), that has never hired a fireman or an engineer, never owned a locomotive or a box car, never published or filed a tariff (Findings 5, 6, 7, 30, 31, App. ii, viii, ix; C. C. A. Op. R. 2020-2021), constitutes, we respectfully submit, a classic in factual misstatement.

As we have repeatedly pointed out, the condemned property constitutes a collection of isolated lead tracks that have always been operated by, and are accessible

to, *only the Burlington Railroad* (Findings 17, 18, 20, App. v-vi). Burlington, not the Bridge Co., has exclusively operated the condemned tracks and served the North Kansas City industries for a quarter of a century (Finding 21, App. vi). The tracks were constructed at various times between 1912 and 1937, *not for the purpose of complying with the Bridge Co.'s charter obligations* (Finding 31, App. ix), but in order to fulfill private real estate contractual obligations assumed by the Development Co. (Findings 13-15, App. iii-v).

The Development Co., having no railroad franchise (Findings 2, 22, App. i, vi; R. 1825), arranged with Burlington to operate the lead tracks and serve the industries located thereon (R. 292-294; Findings 15, 16, 17, 32, App. iv, v, ix; R. 1490-1491, 1845). Burlington thereby assumed the obligations and acquired the rights of a railroad common carrier in the district (R. 464). The North Kansas City shippers thereby became, and presently are, Burlington's transportation customers (R. 1845-1847).

As indicated by the Court of Appeals' opinion, the construction given by the Missouri Supreme Court to Sec. 1512, Mo. R. S. 1939 in *Kansas & Texas Coal Ry. Co.* v. *Northwestern Coal & Mining Co.* (1901) 161 Mo. 288, 320-321, 323, 61 S. W. 684, 691-692, and *St. L., H. & K. C. Ry. Co.* v. *Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483, settled Burlington's right to condemn herein as a matter of Missouri law (R. 2016-2026). Accordingly, we submit petitioners' Point IV is without merit.

V. Bridge Co.'s Union Depot Powers Also Forfeited by Section 5248 Mo. R. S. 1939.

The contention that the Bridge Co. was a Union Depot Co. (Pet. 18, 27-28) was not pleaded by petitioners in the

District Court, nor did they offer any proof of this fact in either the first or the second trials of the issue. We respectfully refer this Court to our discussion of this subject at pages 6-8, * * * *supra*. As the Circuit Court of Appeals indicated, the issue presented by petitioners' Point V presents an argument that "constitutes a departure from the theory of the pleadings and of the trial before the District Court,[12] but, even on its merits, it could not change the result here" (R. 2023). As a matter of fact, the Bridge Co.'s union depot was never built (Findings 5, 6 and 7, App. i, ii) and the condemned tracks could not, therefore, constitute an adjunct thereto. As previously pointed out, the condemned tracks were no part of the facilities for which the Bridge Co. was chartered (Finding 31, App. ix). Moreover, we think the forfeiture provision was equally applicable to union depot companies and respectfully submit the argument made in the Court of Appeals opinion on this question is unanswerable (R. 2023, 2025).

We respectfully submit that neither the Circuit Court of Appeals nor this Court have jurisdiction to entertain an appeal by the Bridge Co. because the same was not prosecuted within three months of April 24, 1940. We further submit that neither the Bridge Co. nor the

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[12] Authority is that a party cannot on appeal depart from his pleadings (*Maynard* v. *Reynolds*, 8 Cir., 251 Fed. 784, 786; *Wolfberg* v. *State Mutual Life Assurance Co.*, 8 Cir., 36 F. 2d 171, 175; *Bates* v. *Coe*, 98 U. S. 31, 37; *Dahl* v. *Montana Copper Co.*, 132 U. S. 264, 266-267; *Virginian Ry.* v. *Mullens*, 271 U. S. 220, 227-228; *Henry H. Cross Co.* v. *Simons*, 8 Cir., 96 F. 2d 482, 486) and trial theory (*Illinois Central R. Co.* v. *Egan*, 8 Cir., 203 Fed. 937, 939; *National Loan & Investment Co.* v. *Rockland Co.*, 8 Cir., 94 Fed. 335, 336-337; *Gratz* v. *M'Kee*, 8 Cir., 270 Fed. 713, 722; *Mechanics' Ins. Co.* v. *C. A. Hoover Distilling Co.*, 8 Cir., 182 Fed. 590, 593; *Indiana Flooring Co.* v. *District National Bank of Washington*, (App. D. C.) 280 Fed. 522; *Atlantic Brewing Co.* v. *Brennan Grocery Co.*, 8 Cir., 79 F. 2d 45).

Development Co. have shown any reason for the issuance of a writ of certiorari herein and, accordingly, we respectfully submit the application should be denied.

Respectfully submitted,

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APPENDIX.

District Court's Findings of Fact (R. 118-124), Together With Supporting Record References.

1. Plaintiff is now, and for more than 38 years last past has been, a railroad corporation organized under the laws of the State of Illinois, authorized to carry on said business in the State of Missouri, with lines of railroad extending in and through the State of Missouri and other states (R. 38-39).

2. North Kansas City Development Company is, and since March 9, 1903 has been, a corporation organized under the laws of the State of Missouri relating to manufacturing and business corporations (R. 39-40, 42; Pl. Ex. 10, R. 329-332; Def. Ex. 4A, R. 839 at 840).

3. North Kansas City Land and Improvement Association is, and since June 27, 1898, has been, a corporation organized under the laws of the State of Missouri relating to manufacturing and business corporations (R. 39-40, 45, 325-329).

4. Articles of Association of Union Depot, Bridge and Terminal Railroad Company were filed and recorded in the office of the Secretary of State of the State of Missouri on May 10, 1901, under Article 2 of Chapter 12 of the Revised Statutes of Missouri of 1899, (now Chapter 32, Article 2, of the Revised Statutes of Missouri of 1929) and Acts amendatory thereto relating to railroad corporations (R. 43; Pl. Ex. 4, R. 269 at 270).

5. Said Union Depot, Bridge and Terminal Railroad Company did not, within two years after its Articles of Association were filed and recorded as aforesaid, begin the construction of any part of the railroads or

facilities described in its Articles of Association (Def. Ex. 9, R. 659 at 747-752, 757; R. 290-292, 296, 283).

6. Said Union Depot, Bridge and Terminal Railroad Company did not, within three years after filing its Articles of Association, expend not less than ten per-cent on the amount of its capital, or any sum, on any of the roads or facilities described in its Articles of Association, or on the construction thereof, or on or in the construction of any railroad (Bridge Co. capital stock was $8,000,000, R. 275; none of the railroad tracks described in the Bridge Co.'s charter were ever built, R. 292, 296; Def. Ex. 9, R. 659 at 747-752; construction of the bridge was not begun until 1909, R. 292, 286; Def. Ex. 9, R. 659 at 751-752).

7. Said Union Depot, Bridge and Terminal Railroad Company did not finish and put in operation, within 10 years from the time of filing its Articles of Association, any of the railroads or facilities described therein (R. 290-292, 296, 283; Def. Ex. 9, R. 659 at 747-752, 757).

8. The Union Depot, Bridge and Terminal Railroad Company began the construction of a double-deck bridge across the Missouri River in 1909, with the view to making the lower deck thereof a railroad bridge and the upper deck a bridge for the use of pedestrians and vehicles (Def. Ex. 9, R. 659 at 752; R. 286, 292). Neither deck of said bridge was completed until on or after December 28, 1911 (R. 292, 286). The upper deck of said bridge was first opened, to use and operation by pedestrians and vehicles, in January, 1912 (R. 292).

9. Two railroad tracks were constructed on the lower deck of said bridge in December, 1911 (R. 292-293), but no locomotives, trains, or cars were run over said tracks until October, 1920 (R. 293). Said tracks on said bridge were not connected with other tracks at either end of said bridge until October, 1920, at which time operation was first begun thereover by Missouri Pacific Railroad Company (R. 293).

10. Said bridge was not constructed, and has never been used for the purpose of complying with any of the provisions of the Articles of Association of Union Depot, Bridge and Terminal Railroad Company (Def. Ex. 9, R. 747-752, 757; R. 292-293, 285-286, 282-283, 296).

11. The plaintiff is a citizen and resident of the State of Illinois. The defendants, North Kansas City Development Company, North Kansas City Land and Improvement Association, Hugh J. Curran, Frederick W. Fratt, and Clara M. Fratt are all citizens and residents of the State of Missouri and of the Western Division of the Western District thereof. Prior to its dissolution, Union Depot, Bridge and Terminal Railroad Company (afterwards called North Kansas City Bridge and Railroad Company) was a citizen and resident of the State of Missouri. The amount in controversy in this action, exclusive of interest and costs, exceeds the sum and value of three thousand dollars (R. 2, 34-39).

12. The North Kansas City Industrial District in Clay County, Missouri, lies within an angle, formed by the convergence of plaintiff's Kansas City-Omaha and plaintiff's Kansas City-Chicago main lines of railroad. The Kansas City-Omaha line bounds the westerly side and the Kansas City-Chicago line bounds the southerly and easterly sides of said Industrial District (R. 255-256, Pl. Ex. 1, R. 263). All the lands, right of ways and tracks sought to be condemned in this cause lie within said angle and immediately adjacent to plaintiff's said main lines of railroad (Pl. Ex. 1, R. 263; R. 256-262, 293-294).

13. North Kansas City Development Company and North Kansas City Land and Improvement Association were incorporated for the purpose of owning, holding, and selling real estate in Clay and Jackson Counties, Missouri, and, particularly, for the development of said industrial district (R. 39-40, 42, 45, 326-335, 434-435).

Prior to the development of said industrial district, said real estate companies owned nearly all the land described and referred to as the North Kansas City Industrial District (R. 40). At said time said real estate companies were, ever since have been, and still are, engaged in selling industrial and factory sites in said district and in the development thereof (R. 40, 285-286; Def. Ex. 9, R. 659 at 754-755). Said real estate companies have sold or leased all, or substantially all, of the land now occupied by industries located in said industrial district (R. 40). Pursuant to said development program, and in order to induce prospective purchasers and lessees to purchase or lease industrial and factory sites in said industrial district, said real estate companies have, by contracts of sale, covenants in deeds, and other agreements, undertaken and agreed with the purchasers or lessees of property in said industrial district, to construct or cause to be constructed, and to operate or cause to be operated, and to maintain or cause to be maintained at the expense of said real estate companies, lead tracks and through switching tracks, connecting with industry tracks, for the purpose of switching cars to and from said industries (R. 3, 40, 45, 434-435, 293, 418; Def. Ex. 9, R. 659 at 779, 765-766, 954; Pl. Ex. 16, R. 406 at 410-412; Pl. Ex. 11, R. 335 at 349; Pl. Ex. 13, R. 360 at 368; Pl. Ex. 15, R. 385 at 395).

14. North Kansas City Development Company constructed the tracks sought to be condemned on the right of ways sought to be condemned (R. 293-294; Ex. 16, R. 405 at 409-412; Def. Ex. 9, R. 659 at 790 and 792; R. 447-449).

15. Beginning with the construction of the Sears Roebuck & Company plant in November, 1912, industrial businesses and establishments of divers kinds have,

from year to year, been located and built in said industrial district (R. 286-289, 1267). At present there are approximately 100 such heavy and light industries in said district (Def. Ex. 9, R. 702; R. 286). From their inception all of said industries have needed railroad service, and they have been served by one or more of said tracks (R. 286-289, 435, 418).

16. From the time of the respective establishment of said industries, they have all been served, and are now being served, exclusively, by the plaintiff by means of said tracks, with the consent of North Kansas City Development Company (R. 294, 462, 465; Def. Ex. 9, R. 659 at 712, 737).

17. All of the private industrial tracks, by means of which said industries are served, in said industrial district, are connected with said lead tracks, and all of said lead tracks are connected with the tracks of the plaintiff, and with no other railroad (Pl. Ex. 1, R. 263; Def. Ex. 9, R. 659 at 697, 737, 739-741; R. 257-262, 293-294, 463). Plaintiff has the corporate power, capacity, equipment, and facilities to operate over all of said switching lead tracks and thereby serves all said private industrial tracks and industries; and plaintiff has operated all of said tracks, and over the same, exclusively, since the respective dates of their construction (R. 294, 462, 465; Def. Ex. 9, R. 659 at 712, 737).

18. The territory, in which the right of ways and tracks sought to be condemned are located, is situated in said angle so formed by the main lines of railroad of the plaintiff (R. 255-256; Pl. Ex. 1, R. 263) and is immediately contiguous, adjacent and tributary to said lines of railroad of the plaintiff, and is not adjacent, contiguous, or tributary to the line of railroad of any other railroad company or common carrier (Pl. Ex. 1, R. 263; R. 256-262, 293-294).

19. Each of the right of ways and each of the tracks thereon sought to be condemned in this cause, with respect to plaintiff's said railroads, are spur, industrial, team, switching, and side tracks, located wholly within the State of Missouri (R. 257-262, 294, 295, 462).

20. The tracks sought to be condemned do not constitute a single railroad unit (R. 294, 463); but consist of a collection of isolated industrial tracks, which are not now and never have been, and cannot be, operated as a unit (Def. Ex. 9, R. 659 at 739-741; R. 256-262, 294, 462-463; Pl. Ex. 1, R. 263); said industrial tracks are connected only with the tracks of plaintiff (Def. Ex. 9, R. 659 at 739-741; R. 257-262, 294, 462).

21. Beginning in March, 1913, and at all times since, plaintiff has filed and published tariffs and schedules of rates, as required by law, for the switching of freight and property over said tracks; and all freight and property which has been switched or moved over said tracks has been switched and moved by the plaintiff under said tariffs and schedules (Bridge Co. Ans., R. 38 at 42; Pl. Exhs. 6 and 7, R. 297-321; R. 464). No tariffs or schedules have ever been filed or published by any company or carrier other than the plaintiff, for movement upon or over any of said tracks (R. 296-297).

22. Neither North Kansas City Development Company, nor North Kansas City Land and Improvement Association, nor Union Depot, Bridge and Terminal Railroad Company (afterwards called North Kansas City Bridge and Railroad Company) ever devoted any of the right of ways, tracks, or property sought to be condemned to public use (R. 296-297, 417, 462).

23. Plaintiff is now devoting, and in the future will continue to devote, the properties herein sought to be condemned to public use (Def. Ex. 9, R. 712, 729, 731, 737; R. 294-295, 462, 465).

24. It is necessary that plaintiff acquire by condemnation the properties herein sought to be condemned (R. 295, 463-464).

25. Plaintiff's Board of Directors has duly authorized condemnation of the properties herein sought to be taken (Def. Ex. 9, R. 659 at 711; Pl. Pet., Par. 11, R. 29; Bridge Co. Ans., Par. 10, R. 44).

26. The lands herein sought to be condemned (being those described in plaintiff's petition) are in the actual possession of North Kansas City Development Company, North Kansas City Land and Improvement Association, Hugh J. Curran, Frederick W. Fratt, and Clara M. Fratt, each of whom claims title to divers parcels thereof, all subject, however, to the exclusive right of the plaintiff to operate thereon the tracks sought to be condemned. North Kansas City Development Company, North Kansas City Land and Improvement Association, Hugh J. Curran, Frederick W. Fratt, and Clara M. Fratt have title of and to all of said lands, appearing of record upon the proper records of Clay County, Missouri, except that the title to a part of said lands appears of record upon said records in the name: North Kansas City Bridge and railroad Company (Pl. Ex. 1, R. 263; R. 281, 294, 322-323, 449, 417; Def. Ex. 9, R. 659 at 722, 773-775, 930; R. 1485-1486, 1490-1491, 1845; Def. Vice President and General Manager Zimmer, R. 1663-1667).

27. The tracks herein sought to be condemned are located on the strips of land above referred to. All of said tracks are owned by the North Kansas City Development Company (Def. Ex. 9, R. 659 at 791-793; Pl. Ex. 1, R. 263; R. 256, 293-294; Ex. 16, R. 405 at 409-412; Def. Ex. 9, R. 659 at 790 and 792; R. 447-449, 411, 1485-1486, 1490-1491, 1845; Def. Vice President and General Manager Zimmer, R. 1663-1667).

28. Plaintiff has been and is unable to agree with the owners of the properties herein sought to be condemned upon the proper compensation to be paid for said properties (Pl. Pet., R. 29; Def. Ans., R. 34-35, 37, 44; R. 322-324, 321).

29. The greater part of all freight traffic, by railroad, moving to and from said industries moves in interstate commerce (Def. Ex. 9, R. 659 at 713, 731; R. 429).

30. The Union Depot, Bridge and Terminal Railroad Company (later called North Kansas City Bridge and Railroad Company) never owned or operated any railroad tracks, railroad locomotives, cars, rolling stock, or railroad equipment of any kind; never had any switch crews, engine crews, trainmen or railway employees of any kind, or any supervisory officers for handling railroad traffic; never filed or published any tariffs or schedules of rates for the transportation of property or passengers; never made any reports to the I. C. C.; never made any deductions from wages of employes or returns or reports or payments, or paid any taxes, under the Federal Railroad Retirement Act or the Federal Carriers Taxing Act; never made any reports, returns, deductions, payments, or contributions under the Federal Railroad Unemployment Insurance Act; never made any application to the I. C. C. or to the Public Service Commission of Missouri for authority to construct or lease any railroad; never made any application to the I. C. C. or to the Public Service Commission of Missouri for authority to issue any securities or evidence of indebtedness, or to make any borrowings; never issued any bills of lading; never transported any freight or property and never sold or issued any tickets for passage by steam railroad; never transported any passengers in that manner; never made reports of accidents to either the I. C. C. or the Public Service Commission of Missouri; and never took action of any kind under the Federal Railway Labor Act (Def. Ex. 9, R. 659 at 753-754, R. 296-297).

31. None of the tracks or right of ways sought to be condemned were described in the Articles of Association of Union Depot, Bridge and Terminal Railroad Company (Def. Ex. 9, R. 659 at 747-751, 757; R. 283, 290-292, 296); nor do any of said tracks connect with any tracks described in said articles, nor with the bridge or depot described therein (compare Pl. Ex. 1, R. 263, which shows the condemned tracks, with Pl. Ex. 3, R. 279, which shows the chartered route of the Bridge Co.; R. 294; Def. Ex. 9, R. 659 at 757).

32. On or about May 17, 1921, North Kansas City Development Company and plaintiff entered into a contract whereby said Development Company granted to the plaintiff the exclusive right to operate over all of the tracks sought to be condemned (Def. Ex. 11, R. 1007-1009; Pl. Ex. B-1, R. 1445 at 1447; R. 465, 1490-1491, 1845, 1803, 1805), which contract was never authorized by the Missouri Public Service Commission (Def. Ex. 11, R. 1007-1009; R. 297).

33. The plaintiff and its officers had no actual knowledge and were not actually aware, until a short time before the commencement of this cause, that the corporate existence and powers of Union Depot, Bridge and Terminal Railroad Company (afterwards called North Kansas City Bridge and Railroad Company) had ceased (R. 459-460, 638-642, 960, 999-1000, 1245-1246).

34. The knowledge, and opportunities for knowledge, of all facts affecting the status of Union Depot, Bridge and Terminal Railroad Company (afterwards called North Kansas City Bridge and Railroad Company) as a corporation, at all times were equally open to all parties to this cause; and no acts, conduct or representations of the plaintiff ever misled any party to his, her, or its injury, or otherwise (Def. Ex. 9, R. 659 at 747-751, 753-754, 757, 712, 737; Pl. Ex. 4, R. 269-275; R. 283, 290-292, 294, 296, 462, 465).

(12)

Supreme Court of the United States

OCTOBER TERM, 1942
No. 1020

NORTH KANSAS CITY DEVELOPMENT COMPANY, NORTH KANSAS CITY BRIDGE AND RAILROAD COMPANY and NORTH KANSAS CITY LAND AND IMPROVEMENT ASSOCIATION,

Petitioners,

against

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GODFREY GOLDMARK,
HENRY N. ESS,
Counsel for Petitioners.

SUBJECT INDEX

TABLE OF CASES

STATUTES, TEXTBOOKS, ETC.

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REPLY BRIEF FOR PETITIONERS

The fundamental error underlying the respondent's argument is the wholly false assumption that the Circuit Court of Appeals reviewed the facts and affirmed the findings of the District Court. From that false conclusion the respondent has argued that all the questions (save the question as to jurisdiction) sought to be raised are not presented by the record. As is about to be shown (p. 7 *post*) the Circuit Court found it unnecessary to exercise the power under the Civil Procedure Rules to review the findings because the Court assumed the basic facts in favor of the

petitioners, but nevertheless held as a matter of law that the Burlington had the right to condemn.

The respondent's brief contains an elaborate recital of facts which have not the slightest bearing on the legal question presented—the right to condemn. No answer need be made here to the vicious attack (respondent's brief pp. 5, 11) upon the late VanSweringens and their "New York bankers" and the references to "side agreements" between other parties who purchased stock of the petitioners long before the institution of this condemnation. All these matters have not the slightest relevance here. The facts are as stated at the top of page 14 of the petition where it appears that the stock of these companies constitutes security for the bonds of Alleghany Corporation which are widely held by the public and dealt in on the New York Stock Exchange.* How, for example, can the right to condemn the tracks and rights of way depend on whether the legal fee charged for preparing the application of the Bridge Company (Respondents Brief p. 5) before the Interstate Commerce Commission was too high or whether the fee included other matters (R. 1527)? Has all this any more materiality than the fact that the Burlington has assets valued at hundreds of millions of dollars or than an inquiry as to whether its bankers are "New York bankers" or reside in Chicago or St. Paul? The purpose of this type of attack is, however, obvious—it is an attempt to create prejudice and to divert attention from the unconscionable conduct of the Burlington in seeking to condemn the properties despite the fact that for over forty years it has owned one-third of the stock of the companies, participated actively in the construction and operation of the very tracks now sought to be condemned, and under oath reported for years

* The so-called "New York bankers" are Trust Companies which are Trustees under the three Alleghany indentures whose sole interest is to protect the security for the bonds issued thereunder.

to the Interstate Commerce Commission that it was operating the tracks of the Bridge Company under lease.*

Upon the argument in the Circuit Court of Appeals, the counsel for Burlington frankly admitted that until 1937 the Burlington believed the Bridge Company to be a bona fide Railroad Company fully possessed of charter rights, and that it was only after the application was filed by the Bridge Company with the State Public Service Commission to determine the manner of crossing the Burlington tracks that counsel sought a way to defeat the application and then "discovered" that the Bridge Company's charter had been forfeited (See Petition, p. 14). Manifestly, this "discovery", even were it well founded, does not alter the *fact* that there were tracks and rights of way which for decades were devoted to a public use, and this with the knowledge and indeed active cooperation of the Burlington. And yet the Burlington has the temerity to argue that these properties in fact were not so devoted!

The argument that the Bridge Company whose tracks were operated under lease by the Burlington did not own any cars, etc., is also wholly immaterial, for the law is well settled in Missouri that where tracks and rights of way are devoted to a public use, the fact that the company owns no equipment and the tracks are operated over by others is wholly immaterial.

> *State ex rel. Hammer* v. *Wiggins Ferry Co.*, 208 Mo. 622;
> *Idalia Realty etc. Co.* v. *Norman's Southeastern Ry. Co.*, Mo. App., 219 S.W. 923.

So, too, the Burlington presents an elaborate argument as to why the pending application of the Bridge Company before the Interstate Commerce Commission for a certificate of convenience and necessity ought not to be granted, and an argument based upon the insolvency of the Bridge

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* See for example photostat of report at R. 517.

Company. Obviously, these arguments are wholly irrelevant but they do show the fear of the Burlington that the certificate will be granted and that by the building of the crossing over the Burlington tracks in the manner already approved by the State Public Service Commission, the Bridge Company will better its financial condition and thus end the Burlington monopoly.

The contention that the defense of estoppel has been waived by "judicial admission" is on a par with some of the other statements of what the record contains. At page 660 of the Record the witness was asked as to negotiations with respect to the possible purchase of the stock of the petitioners owned by the prior owners. The testimony was objected to and referring, of course, to this particular testimony trial counsel for the petitioners stated that the question of estoppel was involved but not an estoppel against the railroad company. Whatever was meant by the statement, certainly the entire defense of estoppel was not intended to be waived by this casual use of that word, nor was there any such finding of waiver below.

The petition for the writ sets forth questions presented and the reasons with respect to each why the petition should be granted. Brief reply will be made to the opposing arguments of the respondents.

I. As to the reconsideration of Madisonville Co. v. St. Bernard Mining Co., 196 U. S. 239.

The fact that the decision of this case was followed in subsequent cases, in some of which even Mr. Justice Holmes concurred, is, of course, no answer to the petition. Obviously, Mr. Justice Holmes did not find it necessary, having been in the minority in the *Madisonville* case, to do other than abide by the decision of the majority in later cases. The fact that the decision was written forty years ago is also of no moment. *Swift* v. *Tyson,* 16 Pet. 1, was the law

for nearly a hundred years, and *Haddock* v. *Haddock*, 201 U. S. 562, for thirty-eight years.* The question is whether the decision is sound and whether there should not be a reconsideration of the important relation between the State and Federal governments in condemnation proceedings under State Statutes.

Specifically, petitioners urge that there should be further consideration of the question as to whether the provision of the State Statute that the proceeding must be brought in the Circuit Court of the County where the land lies (Petition, footnote p. 16), does not expressly make the venue a part of the delegated right to condemn. The action is to condemn real estate—a proceeding in rem in Missouri—and the principle that venue is no part of the right of a *transitory cause of action* has no application. (See, *Tennessee Coal Co.* v. *George*, 233 U. S. 354, and *Texas Pipe Line Co.* v. *Ware*, 15 F. (2d) 171.) It should be pointed out that in his dissenting opinion in *Burford* v. *Sun Oil Co.* (May 24, 1943), Mr. Justice Frankfurter based his dissent, amongst other reasons, upon the fact that the Texas statute there involved did not name the specific court in which the suit was to be brought, and he also made reference to the case of *Texas Pipe Line Co.* v. *Ware*, just referred to. The importance of the question of jurisdiction in the light of these cases warrants a reconsideration of the whole subject.

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* *Blackstone* v *Miller*, 188 U. S. 189 (1903) was overruled in *Farmers Loan Company* v. *Minnesota*, 280 U. S. 204, 209 (1930).

Adkins v. *Children's Hospital*, 261 U. S. 525 (1923) was overruled in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937).

Wachovia Trust Company v. *Doughton*, 272 U. S. 567 (1926) was overruled in *Graves* v. *Schmidlapp*, 315 U. S. 657 (1942).

A multitude of other examples can be found in the well known dissenting opinion of Mr. Justice Brandeis in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U. S. 405, 412, 413.

II. As to appropriate forum.

Since the petition was filed in this case, this Court decided *Burford* v. *Sun Oil Company* on May 24, 1943, and on the same day granted the petition for certiorari in No. 923, *Meredith* v. *City of Winter Haven*, 134 F. (2d) 202—referred to in the footnotes at pages 20 and 24 of the petition herein.

In the *Meredith* case, the jurisdiction was founded on diversity and a declaratory judgment was sought that plaintiffs were entitled to interest upon the redemption of certain municipal bonds. The Circuit Court of Appeals dismissed the action on the ground that it involved questions of state law which were not clear. One of the grounds for the petition for certiorari in this Court was that the Court committed error in dismissing the cause for that reason. It is submitted that, irrespective of any other reasons assigned in the present case, it would be appropriate if the writ were granted so that this case could be heard with the *Meredith* case and the whole question as to the scope of the principle laid down in the *Burford* case and the earlier cases set forth at page 20 of the petition might be determined with respect to cases both at law and in equity where jurisdiction is based on diversity and the State law is not clear or settled.

The respondent does not question any of the argument of the petition with respect to the desirability of having undecided State questions in condemnation decided by the State Courts before the Federal Court speculates as to what the final decision of the State Court may be. The argument seems to be that the ground which is urged in support of the application is incorrectly stated and that the questions have been decided. It is here that the respondent repeatedly makes the false assumption that the findings of the District Court were reviewed and approved in the Circuit Courts of Appeals. That this is not the fact will now be shown.

The Circuit Court of Appeals expressly refrained from approving the findings of the District Court upon which the respondent relies.

Preliminarily, it should be pointed out that inasmuch as the Rules of Civil Procedure are applicable to appeals in condemnation cases (Rule 81a, subdivision 7), the Circuit Court of Appeals has the power under Rule 52a to review the findings of fact in law cases tried without a jury (as was the issue of the right to condemn in the present case) to the same extent as in suits in equity. The scope of such a review is thus stated by the Circuit Court of Appeals of the Eighth Circuit itself in *Aetna Life Insurance Company* v. *Kapler,* 116 F. (2d) 1, 5:

> "The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this court."

The issue on the preliminary trial of the right to condemn was whether the tracks and rights of way were being devoted to the same public use as that to which the condemnor sought to put them. This question in turn involved the question of the status of the alleged user.

The basic findings of fact of the *District Court* were these: (1) That the tracks and rights of way sought to be condemned belonged to the Development Company (R. 121). (2) That the charter of the Bridge Company had expired before the tracks had been built. (3) That neither the Bridge Company nor the Development Company ever devoted any of the rights of way to public use. In addition, before the entry of judgment the District Court refused to find that the Bridge Company was a union depot company the charter of which was not subject to the self-executing forfeiture provisions of the Missouri statutes. Obviously, if the Circuit Court had affirmed the findings of the District Court that the tracks and rights of way belonged to the Development Company, and that in fact they were not

being devoted to a public use by the petitioners, that would have been the end of the case because the question of whether the present and proposed use were the same could not arise. However, the opinion of the Circuit Court makes it entirely clear that it did not review and affirm these basic findings, but assumed their incorrectness and affirmed the judgment of the District Court because, while the property in fact had been devoted to a public use, it had not been *lawfully* devoted. The question (which, amongst others, is sought to be reviewed here) is whether under Missouri law the power has been delegated to condemn property for the same use as that to which it is already being devoted for the sole reason that the user's charter has expired or the construction was ultra vires.

That the Circuit Court did not approve the findings appears clearly from its opinion.* It first says (R. 2016):

> "The test of the Burlington's right to make the condemnation in the present situation, under the statutes and the decisions cited, was, therefore, whether or not the property already was being devoted to railroad use *by another corporation which had the power and the right, under the statutes and under its articles, to engage in such operations.*"

On the question of the title to the tracks and rights of way, the Court says (R. 2018):

> "The trial court found that the tracks had in fact been constructed by and were the property of the Development Company and not the Bridge Company, but it did not rest its decision as to the Burlington's right to condemn upon this narrow ground. *Further discussion of the issue and of the evidence in connection with it is unnecessary here,* because, under the other circumstances in the record, even if the tracks were owned and maintained by the Bridge Company, that fact would not be sufficient to preclude the Burlington from condemning them,

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* Italics supplied in following quotations.

> under section 1512 of the statutes. On the undisputed evidence, the Bridge Company had forfeited any power, which it could possibly claim to have had under its charter, to construct, operate and make a *valid* dedication of the property for public railroad use, and hence the facilities were not exempt from condemnation."

Finally, in discussing the effect of forfeiture of the charter and ultra vires, the Court says (R. 2019):

> "Since the corporation in such a situation is ipso facto stripped of the power to engage in any of its uncompleted charter undertakings, it necessarily follows that any property which it thereafter attempts to acquire for the purpose of carrying on such other operation cannot be regarded as being *legally* dedicated and devoted to an authorized railroad use which will prevent it and any facilities constructed upon it from being subject to condemnation by another railroad company for a similar use."

Thus, the Circuit Court plainly found or assumed that the tracks and rights of way were *in fact* devoted to a public use, but held that they were not being devoted to such public use by a corporation which met the test that the Court laid down—namely, by a corporation which had the power and the right under the statutes and under its articles to engage in such operations. The Circuit Court further held that even if the Bridge Company was a union depot company, its charter was forfeited because the provisions of the Missouri Revised Statutes were applicable to such a corporation.

Because of all of these conclusions, the Court held that under Section 1512 of the Missouri Revised Statutes (1930)*, the petitioners could not resist condemnation although the present and proposed use in fact were the same. That the Court was not attempting to review the findings or approve them further appears from its judg-

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* Set forth at p. 13 of the petition.

ment (R. 2037) which provides that the judgment of the District Court "adjudicating the right of the Chicago, Burlington and Quincy Railroad Company to condemn be and is hereby affirmed *on the grounds* and to the extent stated in the opinion of this Court this day filed herein."

In view of the foregoing, it is idle for the Burlington to argue that the Court reviewed and affirmed the findings of the District Court, and that neither the Bridge Company nor the Development Company in fact ever devoted the property to a public use. *In view of the foregoing, there is no basis for the argument that the questions are not presented as framed in the petition.* As appears in the petition, these questions have never been decided in Missouri and the argument is that in the first instance they should be decided by the State Courts.

The argument of respondent that the questions of State law presented by the petition have already been decided by the Supreme Court of Missouri and that, therefore, the Federal Court need not prophecy as to State law, finds no support whatever in the two cases relied on. One of them, *Kansas & Texas Railway Co.* v. *Northwestern Coal and Mining Company,* 161 Mo. 288, has already been discussed at pages 31, 34 and 36 of the petition. The other case cited in support of the contention that the court has construed Section 1512 R. S. Mo. 1939 contrary to the contentions of the petitioners here is *St. Louis H. & K. C. Ry. Co.* v. *Hannibal Union Depot Co.,* 125 Mo. 82. In that case a railroad company sought to condemn a strip of land belonging to a union depot company and the defendant claimed that the property being devoted to one public use could not be taken and applied to another inconsistent use. The court simply found that it could be so taken except where the new use would interfere with the prior use and found as a fact that the taking of the property would not interfere with the operation of the union depot company. The court said:

> "The power to appropriate a part of defendant's land for plaintiff's railroad is necessarily implied

> from the powers conferred generally, unless to do so will materially interfere with the uses of the union depot, for which it was acquired and is held."

This is, of course, not a holding that there has been any delegation of power to a railroad company to take property for the *same use* to which it is being devoted solely because of forfeiture or ultra vires, and *that* is the question which is presented by the petition and discussed at page 30 of the petitioners' brief. The question is one which has not been decided by the Supreme Court of Missouri.

The foregoing discussion disposes of the other objections which the respondent makes to the granting of the petition. Just because the Circuit Court erred on the law and because of such errors failed to review the findings, the prayer of the petition is that if the cause is not wholly dismissed, it should be remanded to the Circuit Court to decide the questions left undetermined (Petition, p. 28).

III. As to the jurisdiction of the Circuit Court to entertain the appeal from the District Court.

The respondents moved in the Circuit Court to dismiss the appeal from the District Court upon the ground that the Bridge Company should have appealed from the judgment adjudicating the right to condemn (R. 139), and that having failed to do so the appeal from the final judgment was too late. The motion was denied in the Circuit Court of Appeals (R. 2027, 2036). The respondents now renew its motion to dismiss the appeal and urge that neither the Circuit Court nor this Court has jurisdiction to entertain "an appeal by the Bridge Company" (Resp. Brief p. 28).

It is to be noted that the Burlington has not filed a cross-petition for certiorari on the ground that the Circuit Court erred in affirming the judgment of the District Court and in not dismissing the appeal. It would appear, therefore, that the question as to whether the Circuit Court had jurisdiction to entertain the appeal can only arise after the peti-

tion of the Bridge Company and the Development Company for certiorari is granted, at which time the Court would have jurisdiction of the entire cause and *can determine first whether the District Court had jurisdiction,* and only if it does so determine then whether the Circuit Court had jurisdiction to entertain the appeal. The question whether the appeal from the District Court was timely—whether the judgment adjudicating the right to condemn was "final"—cannot be argued *in extenso* in this reply brief, but the following should be pointed out in support of the conclusion of the Circuit Court:

The basis of the Burlington's argument is that the earlier judgment terminated the Bridge Company's corporate existence and that therefore the Bridge Company could not thereafter participate in the case and appeal from the later judgment as a final judgment. The record shows, however, that pursuant to stipulation there was a trial as to the right to condemn (R. 83, 85), and that that sole issue was tried resulting in a judgment (R. 130) adjudicating that the plaintiff did have the right to condemn. In determining that sole issue, the Court considered evidence as to the ownership of the properties as relevant to the question as to whether they were already being used for a public purpose. There was, however, no *adjudication* other than on the question as to the right to condemn and an appeal from a judgment on the question as to the right to condemn does not lie.

> *Luxton* v. *Bridge Company,* 147 U. S. 337;
> *Southern Ry. Co.* v. *Postal Telegraph & Cable Co.,* 93 Fed. 393, affd. 179 U. S. 641.

The record shows that the Bridge Company participated without objection from the Court or the Burlington in all the proceedings following the earlier or "interlocutory judgment".

1. The corporate defendants, including the Bridge Company, moved (R. 142) to set aside the earlier judgment,

which motion of course could be made at any time before final judgment (*Blythe* v. *Hinckley,* 84 F. 228, 229).

2. The Burlington and the defendants, including the Bridge Company, stipulated that the question of damages, of the ownership of the various tracks, and of the division of the damages between the defendants should be tried after the trial on the right to condemn, and that no "final judgment" should be entered until after the trial of those issues (R. 147-8, 158). The stipulation executed after the earlier judgment referred to the prospective entry of a "final judgment" (R. 148).

3. The Bridge Company appeared at the trial on the issue of damages (R. 1349) and made requests to charge (R. 977-979).

4. In connection with the trial on the ownership of the properties and the division of the damages, the Bridge Company requested the Court to make the same findings which it had sought unsuccessfully to have it make at the time of the interlocutory judgment (R. 156).

5. The final judgment itself contained numerous recitals describing the earlier judgment as an interlocutory one (R. 152, 153).

Thus, it appears that all of the parties and the Court treated the earlier judgment as interlocutory only and believed that the Bridge Company had an interest in the cause until the final judgment was entered. In view of this situation the Circuit Court of Appeals applied the principle laid down by this Court in *La Bourgogne,* 210 U. S. 95 at 113. In that case this Court said that:

> "If the Court below has treated a decree as interlocutory and there is doubt on the subject, that doubt should be resolved in favor of the correctness of the conceptions of the lower court."

The cases cited by the Burlington in support of the claim that the earlier judgment was final have no application here. They all involve the well established rule that.

> " 'an adjudication final in its nature as to matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final so as to authorize an appeal without awaiting the termination of the general litigation below.' See *Collins* v. *Miller,* 252 U. S. 364, at 370-1."

Finally, it should be pointed out that the finality of a decree must be determined from what is done on the face thereof as stated by this Court in *City of Paducah* v. *East Tennessee Tel. Co.,* 229 U. S. 476, at 480. The earlier judgment here merely adjudicated the right to condemn and appointed commissioners. An appeal from such a judgment, as shown above, would have been dismissed, and the reasons and findings upon which that judgment was based would not have sustained the appeal, because an appeal must be taken from what is adjudicated and not from the reasons or findings upon which the adjudication is based.

It is submitted, therefore, that the decision of the Circuit Court of Appeals denying the motion to dismiss the appeal to that Court was entirely correct, and that in any event the question does not arise unless and until the writ of certiorari is granted so that the whole record can be here for determination as to whether the District Court had jurisdiction and, if it did, whether the appeal was timely.

The petition for the writ should be granted.

Respectfully submitted,

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